No. _____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

RECALL '92, INC., et al.
Petitioners

versus

EDWIN W. EDWARDS,
Governor of the State of Louisiana, et al.
Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED FOR REVIEW

Does the free speech clause of the First Amendment permit Louisiana to prohibit all political speech within a radius of 600 feet from the entrances to polling places on election and absentee voting days, including political speech not related to any candidate or proposition on the ballot, such as the solicitation of signatures on a recall petition and the wearing of t-shirts or buttons and display of signs publicizing the recall effort.

LIST OF PARTIES TO THIS PROCEEDING

The following parties, plaintiffs and appellants in the proceedings below,[1] are petitioners in this proceeding for writ of certiorari:

Recall '92, Inc.
Shelley E. Corrington
Stephen Lindsley
Cheryl Lee Hensley
Rose S. Wheeler

The following parties, defendants and appellees in the proceedings below, are respondents in this proceeding for writ of certiorari:

Edwin W. Edwards, Governor of Louisiana
Richard P. Ieyoub, Attorney General of Louisiana
W. Fox McKeithen, Secretary of State of Louisiana

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[1] Theodor A. Schirmer and Dr. Wilmer F. West, plaintiffs in the original proceedings in the District Court, have withdrew as parties.

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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners urge that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, which affirmed a decision of the United States District Court for the Middle District of Louisiana, dismissing petitioners' challenge, on First Amendment grounds, to a Louisiana statute which prohibits non-ballot as well as ballot-related political speech within a 600 foot radius of the entrances to polling places on election and absentee voting days in Louisiana.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 2 F.3d 117 and reprinted at Appendix B to this petition for certiorari. The judgment

and opinion of the United States District Court for the Middle District of Louisiana are unreported. They are reprinted at Appendices F and G, respectively.

JURISDICTION

The Court of Appeals rendered its decision on September 17, 1993. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions involved in this case are reprinted in full at Appendix A:

United States Constitution

U.S. Constitution, First Amendment (1791):

Congress shall make no law . . . abridging the freedom of speech, . . .

U.S. Constitution, Fourteenth Amendment (1868):

Section 1. . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Louisiana Revised Statutes

LSA-R.S. 18:1462

A. Except as otherwise specifically provided by law, it shall be unlawful for any person, between the hours of 6:00 a.m. and 9:00 p.m. to perform or cause to be performed any of the following acts within any polling place being used in an election on election day or within any place wherein absentee voting is being conducted, or wherein absentee voting is being conducted, or within a radius of six hundred feet of the entrance to any polling place being used in an election on election day or any place wherein absentee voting is being conducted:

(1) To solicit in any manner or by any means whatsoever any other person to vote for or against any candidate or proposition being voted on in such election.

(2) To remain within any such polling place or place wherein absentee voting is being conducted or within a radius of six hundred feet of the entrance of any such polling place, except when exercising the right to vote, after having been directed, in writing, by an election commissioner or law enforcement officer to leave the premises or area of a polling place or after having been directed, in writing, by a registrar or deputy registrar to leave the place wherein absentee voting is being conducted.

(3) To hand out, place, or display campaign cards, pictures, or other campaign literature of any kind or description whatsoever.

(4) To place or display political signs, pictures, or other forms of political advertising.

STATEMENT OF THE CASE

This case involves a First Amendment challenge to a Louisiana statute, LSA-R.S. 18:1462, which has been interpreted to prohibit all political speech, including political speech unrelated to any candidate or proposition on the ballot, within a 600 foot radius of the entrances to polling places on election and absentee voting days in Louisiana.

Petitioners are asking the Court to address two questions left unanswered in its recent decision in Burson v. Freeman, --- U.S. ---, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992): (1) whether, consistent with the First Amendment, a state can proscribe non-ballot related political speech in areas outside polling places on election days, and (2) at what measurable distance from the polls does the government's restriction of political speech become an impermissible burden on First Amendment rights.

Facts

The petitioners are a group of Louisiana voters who are organizers and members of an incorporated political organization called Recall '92, Inc. The respondents, the Governor, Attorney General and Secretary of State of Louisiana in their official capacities, are the state's primary officials charged with the conduct of elections and the enforcement of election laws.

At the time this litigation began the principal objective of the Recall '92 group was to recall Louisiana Governor Edwin Edwards. In pursuit of their goal, supporters of Recall '92 sought to collect, in the vicinity of polling places on the primary and general election days of

October 3 and November 3, 1992, signatures on petitions for a recall election of the governor.

Louisiana has adopted very onerous and exacting requirements for conducting a successful recall petition campaign.[1] It is necessary to obtain the signatures within a period of 180 days of at least one-third of the total of registered voters in the affected voting area, in the case of a statewide official such as the Governor, ap roximately 750,000 signatures. The recall law requires that voters executing recall petitions sign their names exactly as their names appear on the voter registration rolls and identify their voting ward, precinct, district number and residential address exactly as they appear on the official rolls.

These requirements make collecting signatures at polling places an extremely efficient and effective means of assuring that voters who wish to sign a recall petition have ready access to the precise information required for a valid signature on a recall petition, thus minimizing the risk of error regarding official registration information by voters signing the petition. Additionally, collection of recall petition signatures at the polls dramatically reduces the cost and manpower requirements necessary for a grassroots organization such as Recall '92 to comply with the strict time limit imposed for collecting sufficient valid signatures to invoke a recall election. Collecting signatures at the polls also provides optimal access to registered voters generally and those voters most likely to vote or be interested in signing a recall petition.

LSA-R.S. 18:1462, the statute in question in this case, establishes a "campaign-free" zone emanating a radius of 600 feet from the entrance to each polling place in Louisiana on election and absentee voting days.

This statute was interpreted by the Louisiana Supreme Court to apply to and prohibit recall petition

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[1] LSA-R.S. 18:1300.1, et seq.

signature solicitation by petitioners and the wearing of t-shirts and buttons and the displaying of signs publicizing the recall effort,[2] even though neither the recall nor Governor Edwards was on the October and November, 1992 ballots and petitioners' activities were not related to any candidate or proposition being voted on at the polls. LSA-R.S. 18:1462 is a criminal statute which imposes a misdemeanor penalty for the first offense and a felony penalty of a fine of up to $1000 or imprisonment of up to one year or both for the second and any succeeding offense.

The history of Louisiana voting and election regulations reveals that around the turn of the century, Louisiana, like other states, adopted election laws providing for official ballots and privacy in voting. At that time, some states also adopted prohibitions against campaigning and electioneering activity within specified areas surrounding polling places. However, Louisiana's establishment of a "campaign-free" zone around polling places is of relatively recent vintage, having been initially set at a 300 foot radius in 1960.[3] These provisions were eventually incorporated into LSA-R.S. 18:1462, which was amended in 1980 to increase the distance from a 300 foot radius from the entrances to polling places to a 600 foot radius. There is no legislative history, legislative committee reports or findings of any study or research to explain or justify the amendment.

All but one of the fifty states presently impose some prohibition against electioneering activity within specified distances from polling places, with distances ranging from a 10 foot corridor in New Hampshire and Pennsylvania to

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[2] Schirmer, et al. v. Edwards, et al., Louisiana Supreme Court, No. 92-CQ-2829 (1992), reproduced as Appendix E, page 33a.

[3] La. Acts 1960, No. 221.

a 1,000 foot radius area in Hawaii.[4] Louisiana's 600 foot radius campaign-free zone is the second largest of all the fifty states. Only two other states besides Hawaii and Louisiana have established political speech restricted zones in excess of 300 feet. Kentucky and Wisconsin have 500 foot restricted zones.[5] Thirty-eight states have established campaign-free zones of 250 feet or less. Twenty-five of these states have zones of 100 feet or less.[6]

Prior to October 1, 1992, two opinions had been issued by Louisiana's attorney general authorizing the collection, within the six hundred foot radius zone surrounding polling places, of signatures on petitions such as those sought to be circulated by petitioners. According to these early attorney general opinions, "the Louisiana Election Code does not specifically prohibit citizens from soliciting signatures for a petition" which is not on the ballot.[7] Additionally, in the past, individuals involved in several petition drive efforts had been permitted to collect signatures at or immediately outside polls unimpeded by election officials. Prior to October 1, in anticipation of the upcoming October 3rd and November 3rd elections, Theodor A. Schirmer, one of the organizers of the Recall '92 petition drive, had worked out arrangements with local

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[4] See Appendix to Note, "Defoliating the Grassroots: Election Day Restrictions on Political Speech," 77 Georgetown L.J. 2137 (1989).

[5] Wisconsin's 500 foot restricted zone was recently declared unconstitutional in Calchera v. Procarione, 805 F.Supp. 716 (E.D.Wis. 1992).

[6] See Note, "Defoliating the Grassroots: Election Day Restrictions on Political Speech," supra. at 2146-47, 2196-2200.

[7] La. A.G. Opinions 91-597 and 92-650. Louisiana's legislature met after the first attorney general opinion and made no effort to correct such interpretation.

Baton Rouge, Louisiana election officials establishing ground rules for setting up tables and collecting signatures in the immediate vicinity of polling places in East Baton Rouge Parish.

Despite this precedent for benign treatment of petition signature collection activity around polling places, on October 1, 1992, state officials, including the secretary of state and the attorney general, notified all local clerks of court of the sixty-four Louisiana parishes and the election commissioners working for them of a newly imposed requirement prohibiting the petition activities of Recall '92 volunteers within the six hundred foot radius zones surrounding the polling places.

On October 1, 1992, two days before the October 3rd primary, the Louisiana attorney general issued a third opinion on the subject, reversing the two previously issued opinions which authorized such activity, and concluding for the first time that the 600 foot restriction applies to petition activities.[8]

On October 3, 1992, a primary election was conducted in Louisiana and the ballots in the various parishes included candidates for public office and propositions submitted to the voters, none of which had any relation to the Recall '92 effort or involved Governor Edwards. At various locations throughout the state, some of the plaintiffs were ordered to leave areas within six hundred feet of the polling places where they were attempting to collect signatures on their recall petitions. In addition, several of them were either denied the opportunity to vote, required to remove buttons or t-shirts in order to be allowed to vote or were permitted to vote only after initial refusal for wearing t-shirts with the Recall '92 logo on them.

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[8] La. A.G. Opinion 92-650(A).

Despite these activities and restrictions directed at petitioners and other Recall '92 volunteers, other individuals, unrelated to Recall '92, wearing campaign or political advertisements in the form of buttons, t-shirts and hats, were not similarly treated or prevented from voting and, at certain poll locations in the state, even campaign signs of individuals whose names were on the October 3rd election ballot were permitted within the six hundred foot radius.

Proceedings Below and Related Proceedings

After the October 3rd primary, petitioners filed suit in U.S. District Court in the Middle District of Louisiana seeking to have LSA-R.S. 18:1462 declared unconstitutional and injunctive relief from the enforcement of this statute against them during the November 3rd general election and on subsequent election days. On October 19 and 20, 1992, the district court conducted a two-day trial on the constitutionality of the statute and petitioners' request for both preliminary and permanent injunctions.

During the trial, in addition to the above facts, petitioners presented video tape and testimonial evidence showing that a 600 foot radius from the entrance to the polling places, an area encompassing approximately 1,130,000 square feet or almost 26 (25.95) acres around each polling place, typically includes a number of streets, public sidewalks, sometimes vast areas of public parks and other areas of public property traditionally and typically open and available for generally unrestricted use by the public. In numerous polling locations, the 600 foot parameter was beyond view and in some instances blocks away from the entrance to the poll.

Plaintiffs also presented evidence showing that recall and other petition drives unrelated to any candidate or matters on the ballot had historically been conducted in

Louisiana at or in the close vicinity of polling places without any complaints of interference with the voting taking place at the polls.

In contrast, the only evidence presented by defendants was anecdotal evidence by several state officials of the need to have the 600 foot campaign-free zone in order to prevent harassment, intimidation and interference with voters. Respondents did not present any concrete evidence to support the asserted proposition that in order to prevent intimidation, harassment or interference with voters, it is necessary to extend the campaign-free zone over such a large area as is encompassed within the 600 foot radius or that it is necessary to enforce it against persons soliciting petition signatures unrelated to any matter on the ballot.

The Louisiana legislator who authored the amendment extending the restricted zone from 300 to 600 feet testified that the extension was intended to substantially reduce the utility, and hence the use, of volunteer and paid campaign workers ("poll workers") to contact and attempt to influence voters one last time on their way to the polls. According to this legislator:

> "If we could do away with the poll workers it would save the candidates in our area of the state a great deal of money because if one candidate had poll workers then the other candidate felt like he had to have poll workers."

The legislator testified that extending the restricted zone to a 600 foot radius was completely successful in making it impossible for poll workers to effectively contact voters on their way to the polls.[9] He also admitted that that statute

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[9] "So from my personal perspective, we don't have poll workers at (continued...)

was never originally intended to address political activities on election days other than as relate to candidates and issues on the ballot at the polls.[10]

Another legislative sponsor of the 600 foot radius zone amendment confirmed that the purpose of the statute was to completely curtail the activities of poll workers and to isolate voters from last minute efforts to influence their votes.[11]

At the conclusion of the trial, the district court denied petitioners' requested declaratory and injunctive relief and ruled that LSA-R.S. 18:1462 is constitutional under this Court's decision in Burson. The court determined that Section 1462 creates a constitutionally permissible campaign-free zone around polling areas and applies to all political issues and parties, whether or not they are on the ballot.

Petitioners appealed to the 5th Circuit and in the interim sought injunctive relief pending appeal. The district court denied relief. A panel of the 5th Circuit certified to the Louisiana Supreme Court the question of the applicability of Section 1462 to petitioners' non-ballot

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[9](...continued)
election precincts anymore. That was the real purpose of the legislation and it has generally achieved that objective."

[10] "I don't recall specifically any discussion of anything other than the actual people being at the polls for and on behalf of a candidate or an issue to be voted upon."

[11] "...ninety-five percent of the time ... when people leave their houses, they've made up their minds on who they're going to vote for or what issue they are going to vote for or against and that's the way it ought to be. And, I think that it would be good that if on election day people had the time to consider all of the issues, consider all of the paraphernalia that's been handed out, all the campaign rhetoric, and to make up their minds in a logical way and not have last minute efforts to change their minds."

related activity. After the Louisiana Supreme Court ruled that Section 1462 applied to such activity,[12] the panel granted an injunction pending appeal, which injunction allowed the petitioners and other Recall '92 supporters to solicit recall petition signatures at a distance as close as 100 feet to the entrances to polling places during the November 3, 1992 general election and a subsequent special election held in some parts of the state.[13] The panel suggested that the 600 foot limit might be unconstitutional under Burson.

While the appeal of this case was pending in the 5th Circuit, one of the original plaintiffs and Recall '92 organizers, Ted Schirmer, sought to quash a state criminal charge against him for soliciting recall petition signatures within the 600 foot radius zone.

In the state court hearing on his motion to quash, some of the same public officials who testified in this case were called to testify. Since the state court hearing occurred on July 19, 1993, after the November 3, 1992 general election and the subsequent special elections during which petitioners were permitted, under the 5th Circuit's injunction pending appeal, to solicit signatures as close as 100 feet to the entrances to polling places, these officials were asked whether petitioners' activities, at 100 feet from polling place entrances, caused any problems of interference with or harassment of voters. Their answers, that petition solicitation as close as 100 foot to the entrances to the polls did not cause any problems of voter interference or harassment, provide empirical evidence that a restriction of no more than 100 feet around the entrances to polling places on election days is sufficient to prevent any voter

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[12] See, Appendix E, page 33a.

[13] See, Appendix C, page 20a.

interference or harassment by solicitors of petition signatures.[14]

In that companion state criminal case, the state trial court made the following findings:

> "The testimony that has been presented of course indicates that the officials charged with enforcing these limits apparently have to wrestle with them every election. But I really didn't hear anything that they have a problem with--that they had a problem with at 100 feet which was the limit in November that would not have also been a problem at 600 feet. That was the reason for my question to Mr. Fowler whether the 100-foot limit which the state was forced to use in November presented an problems--or any different problems than they had in prior elections when the limit was 600 feet. And it was my appreciation of his testimony that there was no unique problem, nothing that they wouldn't have had the distance been six times greater. . . State of Louisiana v. Schirmer, Appendix H, page 56a.

The state court judge, citing this Court's decision in Burson and the 5th Circuit's interim decision in this case granting the injunction pending appeal, held LSA-R.S. 18:1462 unconstitutional on First Amendment grounds.[15]

On September 17, 1993, the 5th Circuit, likewise citing Burson, reached the opposite conclusion. The 5th Circuit affirmed the judgment of the district court in this case, holding that LSA-R.S. 18:1462 is valid under the First

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[14] See, Appendix H, page 56a.

[15] See, Appendix H, page 56a. This case is presently pending on appeal before the Louisiana Supreme Court.

Amendment because Louisiana has a compelling interest in providing a campaign-free zone around its polls and the 600 foot radius zone is sufficiently narrowly tailored to achieve the state's compelling governmental interests. The court further held that the statute's application to political speech of individuals and to the display of buttons, t-shirts and signs unrelated to candidates or propositions on the ballot does not render it overbroad.

REASONS FOR GRANTING WRIT

In the plurality opinion in Burson, this Court upheld, against a First Amendment challenge, a 100 foot radius campaign-free zone around polling places imposed by the State of Tennessee, on ballot-related political speech. The Court held that since the Tennessee statute in question imposed a content-based restriction on political speech in a public forum, the statute was subject to strict scrutiny. The Court found that the states have a compelling interest in protecting voters from confusion and undue influence, insuring the integrity and reliability of the electoral process and preventing fraud or duress. Relying on the long history of election reform and the imposition of political speech restricted zones around polling places in most of the states including Tennessee, this Court concluded that some restricted area around the polling places on election day is necessary to serve the states' compelling interest in preventing voter intimidation and election fraud.

The real question, according to this Court in Burson, is how large a restricted zone is permissible in order to meet the constitutional requirement that the regulation be necessary to serve the state's compelling interest and also sufficiently narrowly tailored to achieve such interest without unduly impinging constitutionally protected First Amendment political speech rights.

The Court determined that Tennessee's 100 foot radius campaign-free zone, typical of the range of campaign-free zones established by most of the states, fell on the "constitutional side of the line."

This Court should grant writs to address two important questions affecting political speech rights left unanswered in Burson: (1) whether, consistent with the First Amendment, a state can proscribe non-ballot related political speech in areas outside polling places on election days, and, if it can, (2) at what measurable distance from the polls does the government's restriction of political speech become an impermissible burden on First Amendment rights.

In addition this Court should grant writs to resolve a conflict between the 5th Circuit's decision in this case and the 11th Circuit's decision in Clean-Up '84 v. Heinrich, 759 F.2d 1511 (11th Cir. 1985), which held that Florida's 300 foot campaign-free zone, half the distance of Louisiana's, was unconstitutionally overbroad.

In another case decided since Burson, a district court, relying on Burson, found that a Wisconsin statute prohibiting campaign speech within 500 feet of the polls on election day was not sufficiently narrowly tailored to achieve the state's interest, and therefore unconstitutional. Calchera v. Procarione, 805 F.Supp. 716 (E.D.Wisc.1992). Since Burson, two separate panels of the Fifth Circuit in this case, a state court judge and a federal district court judge, all relying on Burson, reached conflicting decisions. This Court's guidance on how and where to draw that constitutional line referred to in Burson for polling place political speech restricted zones is essential to avoid continuation of conflicting decisions in the lower courts on this issue.

I.

Most of the compelling interests identified in Burson as justifying the Tennessee 100 foot radius campaign free zone restriction on ballot related political speech[16] -- prevention of voter confusion and intimidation and election fraud -- are related to political speech on ballot topics. As the 5th Circuit panel pointed out in its interim opinion granting an injunction pending appeal in this case:

> "... these justifications as applied to political activity not related to any matter on the ballot have limited relevance to the core concerns relied on in Burson, which were protecting the integrity of the ballot from fraud and intimidation. Persons conducting political activity not related to a matter on the ballot have no incentive to attempt to prevent people from voting or to affect how they vote at the polling place, and the voters are certainly less likely to perceive that the activities of such persons are aimed at their voting or how they vote in the polling place."[17]

The only compelling state interests identified in Burson that may be adversely affected by non-ballot related political speech -- protecting voters from physical

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[16] The plaintiff in Burson challenged the Tennessee campaign-free zone as it applies to candidates on the ballot. The language of the statute appears to apply to only ballot related campaign activity and does not appear to address non-balloted related political speech, although some disagreement with that interpretation was voiced by Tennessee's Attorney General in oral argument.

[17] See, Appendix C, page 20a.

interference and preventing disruptions at the polls -- diminish and at some point fade completely with increased distance from the polls. (See, Part II below.)

The only other interests identified by either the respondents or the 5th Circuit in support of the necessity of banning non-ballot related speech are either not compelling interests or, if they are, the regulation in question doesn't serve them.

The testimony of legislators involved with the passage of Louisiana's 600 foot campaign free zone demonstrates that the primary concern of the statute is not election fraud or voter intimidation, but instead is perceived voter sensitivity to being bothered by political workers as they approach the polls to vote. However as this Court long ago recognized in Mills v. Alabama, 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966), the state has no compelling interest, indeed no right, to silence all political debate that might reach the voter on election day. This Court and the lower courts have consistently held that statutes designed to insulate voters from outside influences or to avoid offense or bother to sensitive individuals are invalid on First Amendment grounds. Mills v. Alabama, supra; Daily Herald Company v. Munro, 838 F.2d 380 (9th Cir. 1988); Florida Committee For Liability Reform v. McMillan, 682 F.Supp. 1536 (M.D. Fla., 1988); NBC v. Cleland, 697 F.Supp 1204 (N.D. Ga., 1988); see also Boos v. Barry, ___ U.S. ___, 108 S.Ct 1157 (1988).

Other than offense to sensitive voters, the only other proposed compelling state interest articulated by respondents and the 5th Circuit is the state's interest in preventing "disruption of the polling place and the election process."

With respect to this interest of the state, and the 5th Circuit's reliance on this interest, the state has no evidence that petition solicitation activities and the wearing of t-shirts and buttons at polls have in the past or will in future cause

"disruption" at the polls.[18] Petition drives have been historically conducted in Louisiana in the vicinity of the polls without there being any disruption to the election process. Even if there is some remote risk that individuals opposed to the recall drive might interact with the petitioners at the polls, preserving the integrity of the election process means preserving a process free from fraud, not a process free from friction.[19] As this Court noted in City of Houston v. Hill, 482 U.S. 451 at 452, 107 S.Ct. 2502 (1987), "a certain amount of expressive disorder is inevitable in a free society and must be protected if freedom is to survive."

With respect to the question of disruption at the polls, all cases that have considered the matter have found unconstitutional polling place restrictions imposed on exit polling and media interviewing. Daily Herald Company v. Munro, supra.; NBC v. Cleland, supra.; CBS, Inc. v. Smith, 681 F.Supp 794 (S.D. Fla 1988). Such activity is at least as intrusive and disruptive as the activity proposed by petitioners in the instant case. Yet the courts have recognized that prohibitions of such activity around and immediately adjacent to polling places is violative of paramount First Amendment rights and poses no significant

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[18] The 5th Circuit opinion in this case did not even discuss how the wearing by some individuals of t-shirts or buttons with a political message is disruptive to voters entering the polls. Additionally, as far as petitioners have been able to ascertain and the evidence introduced demonstrates, no one in Louisiana, except petitioners, has been denied access to the polls or their environs or denied the right to vote because of the message contained on any t-shirt, other article of clothing or button being worn, including candidates on the ballot wearing their own political advertisement decorated clothing and paraphernalia.

[19] See Note, "Defoliating The Grass Roots: Election Day Restrictions On Political Speech," supra. at 2176.

interference with the right to vote or the secrecy of the ballot.[20]

Neither the respondents nor the 5th Circuit identified what compelling state interest is served by a campaign-free zone around polling places in which individuals are prohibited from collecting signatures on a petition with respect to a matter not on the ballot or wearing t-shirts and buttons in support of their activities.

None of the compelling interests historically identified to support limited campaign-free zones around polling places are implicated by the activities in question in this case. Even if such activities might contribute to congestion at the immediate entrance to the polling places or some interference with voters entering the polls, the state's interest in protecting voters from such inconvenience can be completely served by a restricted zone in the immediate vicinity of the polls' entrances.

II.

Even if the state has a compelling interest in restricting non-ballot related political speech in the vicinity of polls on election and absentee balloting days, as this Court found in Burson, the Court was careful to limit its holding by acknowledging that "[a]t some measurable distance from the polls . . . governmental regulation of [political speech] could effectively become an impermissible

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[20] The 5th Circuit discounted the applicability of the exit polling cases and concluded that petition signature solicitation can be treated differently by the state than exit polling because "there is no evidence of widespread voter harassment or intimidation by exit-pollers." Based on this rationale, however, non-ballot related signature solicitation should be treated exactly like exit-polling for First Amendment purposes, since the state can point to and the court could identify no evidence of "widespread voter harassment or intimidation" by solicitors of petition signatures.

burden . . ." 112 S.Ct. at 1856. This Court recognized that the real question is how large a political speech restricted zone is permissible without running afoul of the First Amendment.[21]

A comparison of the Tennessee zone, approved in Burson, and Louisiana's zone, approved by the Fifth Circuit, is revealing. The Tennessee statute, with its 100 foot radius restriction, creates an approximately 31,000 square foot campaign-free zone around each polling place, encompassing less area than 3/4 (.72) of an acre with a diameter of less than 4/100 of a mile (the distance of approximately 2/3 of a football field). In contrast, the Louisiana statute imposing a 600 foot radius zone covers an area 36 times the area covered by the Tennessee statute, creating a 1,131,000 square foot buffer zone around each poll, encompassing an area of almost 26 (25.95) acres with a diameter stretching almost a quarter (.227) of a mile (the distance of 4 football fields).

Respondents argued, and the 5th Circuit agreed, that the difference between a 100 foot radius zone and a 600 foot radius zone is simply a difference in degree, not subject to judicial scrutiny and having no constitutional significance for First Amendment purposes. According to the 5th Circuit, if Louisiana is entitled to establish a campaign free zone, the fact that it is a 600 foot radius zone rather than a 100 foot radius zone is of no moment.

In support of this conclusion, the 5th Circuit relied on Burson's language absolving the state of the burden of demonstrating empirically the objective effects of, and

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[21] As the earlier panel of the 5th Circuit noted in its injunction pending appeal, the Burson decision was predicated, in part, on wide-spread consensus among the states regarding the need for some restricted zone around polling places. While Tennessee's 100 ft. zone falls within the generally accepted range among the states, Louisiana's 600 ft. zone is the second largest (behind Hawaii's 1,000 ft. zone) and is significantly out of line with the restricted zones of the remaining states.

therefore need for, the size of the restricted zone in question. In Burson, this "modified burden of proof" was justified by the long uninterrupted history of campaign-free zone restrictions exemplified by the Tennessee statute in question, which makes it difficult for states, without sustaining some level of damage to or interference with the election process, to demonstrate empirically the need for the size selected for such restrictions.

However Burson's rationale in this regard does not support sustaining Louisiana's 600 foot radius zone on a "lack of empirical evidence" basis. Louisiana's restricted zone is of recent vintage, dating back only to 1960. In addition, its 600 foot manifestation only dates back to 1980.

Additionally, Louisiana does have empirical evidence that a 600 foot zone is not necessary to avoid interference at the polls by petition solicitors, given the state's history of such solicitation being allowed in the immediate vicinity of the state's polls until the state's recent decision, in October, 1992, at least partially in response to the Recall '92 effort, to restrict such access. Further the state's recent forced experiment, ordered by the 5th Circuit, with allowing solicitation at 100 feet in the November 1992 general election, and the absence of any problems at this limited range, also provides empirical evidence that Louisiana's 600 foot zone, the second largest in the nation, is neither necessary, nor sufficiently narrowly tailored, to pass constitutional muster on First Amendment political speech grounds.

In addition, Louisiana's 600 foot radius campaign free zones in most instances, with the exception of extremely rural areas, encompass significant numbers and areas of traditional public fora such as streets, sidewalks and parks. With limited exceptions, courts have historically struck down content based restrictions on speech in traditional public fora. United States v. Grace, 461 U.S. 171, 103 S.Ct. 1702 (1983). Louisiana can show no

compelling interest that is served by imposing its political speech restrictions in areas assumed by its citizens, including voters, to be areas historically available for public and political discourse. Nor can Louisiana demonstrate the necessity, as required by the strict scrutiny standard applicable to such content-based speech restrictions in a public forum, of a geographically extensive zones. Because of their enormous size, the Louisiana zones severely affect political speech activities in public fora, such a streets, sidewalks and parks.

Finally, the dissent in Burson noted that in the case of such large area restricted zones, censorship rather than the protection of voting rights might be found to be the animating force behind the restriction. In Louisiana, the evidence overwhelmingly supports this conclusion. The 600 foot zone was not applied by state officials to petition activities until Recall '92's campaign to recall the present governor. In addition the coincidence with petitioners' recall campaign of the attorney general's reversal of opinion regarding the applicability of the statute to recall activities and the legislature's recent enactment of a statute specifically proscribing recall petition activity within the 600 foot radius zone, LSA-R.S. 18:1300.6, demonstrate Louisiana's illegitimate censorial intent.

. The Court should grant writs to reverse the Fifth Circuit's use of Burson to legitimate a zone 36 times the size of that approved in Burson in the face of empirical evidence that such a vast zone is neither necessary nor narrowly tailored to serve any legitimate, much less compelling, state interest and, in light of the further unavoidable evidence that the motivating purpose of the Louisiana statute is to censor certain kinds of political speech, such as that undertaken by the petitioners.

III.

Finally, this Court should grant petitioners' application for writ of certiorari to resolve the conflict the decision in this case creates with the 11th Circuit decision in Clean-Up '84 and post-Burson decisions on this issue.

Although decided prior to Burson, Clean-Up '84, like the instant case, involved the constitutionality on First Amendment grounds of a 300 foot polling place restriction on non-ballot related petition solicitation, an issue not addressed by this Court in Burson. Because non-ballot related political speech does not implicate the voter intimidation and election fraud concerns that Burson held may justify restrictions on ballot-related political speech, guidance from this Court will greatly assist the lower courts in addressing First Amendment challenges to such restrictions.

In addition, given the conflicting decisions of lower court that have relied on Burson, this Court's guidance on how and where to draw that constitutional line referred to in Burson for polling place political speech restricted zones is essential to avoid continuation of conflicting decisions on this issue.

CONCLUSION

The importance to democracy of vigorous grassroots political speech, as exemplified by petitioners and their counterparts in Clean-Up '84, require this Court and the lower courts to strike a proper and constitutionally sound and sensitive balance between the rights of such political speakers and the states' legitimate governmental interests in protecting the voting rights of all their citizens. For this reason and those described above, petitioners urge this Court to grant their petition for writ of certiorari.

Respectfully Submitted,

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APPENDICES TO
Petition for Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

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APPENDIX A.

U.S. Constitution, First Amendment (1791):

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Constitution, Fourteenth Amendment (1868):

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

LSA-R.S. 18:1462.

Acts Prohibited on Election Day: Electioneering; Exception; Enforcement; Penalty

A. Except as otherwise specifically provided by law, it shall be unlawful for any person, between the hours of 6:00 a.m. and 9:00 p.m. to perform or cause to be performed any of the following acts within any polling place being used in an election on election day or within any place wherein absentee voting is being conducted, or wherein absentee voting is being conducted, or within a radius of six hundred feet of the entrance to any polling place being used in an

election on election day or any place wherein absentee voting is being conducted:

(1) To solicit in any manner or by any means whatsoever any other person to vote for or against any candidate or proposition being voted on in such election.

(2) To remain within any such polling place or place wherein absentee voting is being conducted or within a radius of six hundred feet of the entrance of any such polling place, except when exercising the right to vote, after having been directed, in writing, by an election commissioner or law enforcement officer to leave the premises or area of a polling place or after having been directed, in writing, by a registrar or deputy registrar to leave the place wherein absentee voting is being conducted.

(3) To hand out, place, or display campaign cards, pictures, or other campaign literature of any kind or description whatsoever.

(4) To place or display political signs, pictures, or other forms of political advertising.

APPENDIX B.

THEODOR A. SCHIRMER, et al, Plaintiffs

NUMBER 92-3000

Shelley E. Corrington, Individually, Et Al, Plaintiffs, - Appellants

versus

EDWIN W. EDWARDS, Governor of the State of Louisiana, and in His Official Capacity, et al, Defendants - Appellees

United States Court of Appeal, Fifth Circuit

Appeal from the United States District Court for the Middle District of Louisiana.

Before POLITZ, Chief Judge, and REYNALDO G. GARZA, and JOLLY, Circuit Judges.

REYNALDO G. GARZA, Circuit Judge:

Appellants appeal the district court's adverse judgment, which denied their constitutional challenge to Louisiana's campaign-free zone codified at LSA-R.S. 18:1462. Persuaded that Louisiana has a compelling interest in creating a campaign-free zone, and that the statute is narrowly drawn to achieve that end we AFFIRM.

FACTS

The plaintiffs-appellants are a group of Louisiana voters, who are members of the political organization called Recall '92, Inc. The principal objective of the group is to recall Louisiana Governor Edwin Edwards. The recall procedure, which is codified at LSA-R.S. 18:1300.1 et seq., requires signatures on a recall petition of not less than one-third of the total electors of the voting area, collected and submitted within a 180-day period.[1]

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[1] In essence, this would require about 750,000 signatures.

In order to further their effort, the appellants seek to establish that LSA-R.S. 18:1462 is unconstitutional.[2] Section 1462 as interpreted by the Louisiana Supreme Court:

> [P]roscribes on election day, outside of the polling place itself but within a radius of six hundred feet from the entrance thereto, all solicitation of signatures for a recall petition that is not on the ballot that is to be voted on at the election for which the polling place is open. [Section 1462] proscribes in the polling place or said six hundred foot radius

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[2] The current version of Section 1462 reads as follows:

§ 1462. Acts prohibited on election day: electioneering; exception; enforcement; penalty

A. Except as otherwise specifically provided by law, it shall be unlawful for any person, between the hours of 6:00 a.m. and 9:00 p.m. to perform or cause to be performed any of the following acts within any polling place being used in an election on election day or within any place wherein absentee voting is being conducted, or wherein absentee voting is being conducted, or within a radius of six hundred feet of the entrance to any polling place being used in an election on election day or any place wherein absentee voting is being conducted:

(1) To solicit in any manner or by any means whatsoever any other person to vote for or against any candidate or proposition being voted on in such election.

(2) To remain within any such polling place or place wherein absentee voting is being conducted or within a radius of six hundred feet of the entrance of any such polling place, except when exercising the right to vote, after having been directed, in writing, by an election commissioner or law enforcement officer to leave the premises or area of a polling place or after having been directed, in writing, by a registrar or deputy registrar to leave the place wherein absentee voting is being conducted.

(3) To hand out, place, or display campaign cards, pictures, or other campaign literature of any kind or description whatsoever.

(4) To place or display political signs, pictures, or other forms of political advertising.

all wearing of clothing or buttons bearing visible words or symbols supportive of such recall.[3]

Prior to the November 3, 1992 election, appellants brought suit to enjoin the application of Section 1462 so that they would be able to obtain the required amount of signatures within the 180-day window. The appellants sought to circulate petitions, obtain signatures, wear buttons, display paraphernalia, and pass out other materials to support their cause at the November 3, 1992 election. There was nothing on the ballot pertaining to the recall effort.

On October 3, 1992, Theodor Schirmer was not permitted to vote with a Recall 92 T-shirt at one location, and then at another location was arrested for violating Section 1462 by attempting to solicit signatures on a recall petition. Shelley Corrington was also not permitted to vote because she was wearing a T-shirt advertising the recall effort. There were numerous other plaintiffs, who had similar experiences in forwarding the recall drive.

PROCEDURE

The plaintiffs brought suit in the Middle District of Louisiana pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3) and (4) seeking declaratory and injunctive relief against the application of the campaign-free zone. On October 19 and 20, 1992, the district court conducted a two-day trial to determine the constitutionality of LSA-R.S. § 18:1462.

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[3] The statement on the application of Section 1462 was issued by the Louisiana Supreme Court in response to the prior panel's certification of the question while the temporary restraining order pending appeal was considered and granted.

The plaintiffs launched three grounds of attack on Section 1462: (i) the statute placed an excessive burden on their First Amendment rights because it proscribed campaign activity within a 600-foot radius around polling places; (ii) even if constitutional, Section 1462 only applied to issues or persons on the ballot; or alternatively (iii) the statute was enforced in a discriminatory and content-rooted manner in derogation of the plaintiffs' First Amendment rights.[4]

The district court, relying principally on Burson v. Freeman, --- U.S. ---, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992), found that the statute was constitutional. The court determined that Section 1462 created a constitutional campaign-free zone around polling areas, and applied to both issues and parties whether or not they were on the ballot.

The plaintiffs appealed to the Fifth Circuit, and in the interim sought temporary injunctive relief pending appeal. The district court denied plaintiffs' application for a temporary restraining order; however, an earlier panel of this court granted plaintiffs' motion for an injunction pending appeal. See Schirmer v. Edwards, No. 92-3900 (5th Cir. Oct. 29, 1992). At long last, we are not able to render a final decision on appellant's claims.

DISCUSSION

The appellants assert on appeal that Section 1462 is invalid under the First and Fourteenth amendments. They contend: (i) Louisiana does not have a compelling interest

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[4] The district court declined to rule on the plaintiffs' discriminatory application claims - persuaded that the issue would be better raised as a defense to a state court criminal action. The appellants combine this argument with their void for vagueness defense.

in providing for a 600-foot campaign-free zone around its polls; (ii) even if the state has a compelling interest in a campaign-free zone, the statute is not narrowly tailored to achieve that interest because 600 feet is excessive; (iii) the statute is facially invalid because its content restriction is substantially overbroad; and (iv) the statute is void for vagueness.

We find that: (i) Louisiana has a compelling interest in maintaining campaign-free zones on election day; (ii) the statute is narrowly tailored to achieve that compelling interest; (iii) the statute is not substantially overbroad; and (iv) we need not address the void-for-vagueness argument. Therefore, the district court's decision is AFFIRMED.

i. *Does Louisiana have a Compelling Interest in Maintaining a Campaign-Free Zone around its Polls During Elections?*

Section 1462 posits the First Amendment's guarantee of the right to free speech against the state's attempt to secure its citizens' right to vote in a environment free from intimidation, harassment, confusion, obstruction, and undue influence. This conflict of First Amendment rights necessarily requires a compromise between the two. The Supreme Court addressed the issue head on last term in Burson v. Freeman, --- U.S. ---, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992).

In Burson, the court found a Tennessee Statute that proscribed campaign activity within a 100-foot radius of its polls on election day to be constitutional. The court found that the statute implicated three First Amendment concerns; (i) regulation of political speech; (ii) regulation of speech in a public forum; and (iii) regulation of speech based on

content. The Burson plurality[5] found that a content-based restriction on political speech in a public forum is subject to strict scrutiny.[6] Strict scrutiny requires Louisiana to show that Section 1462 is narrowly tailored to achieve a compelling governmental interest. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983).

[1] Undeniably, both the Tennessee statute and Section 1462 are content-based restrictions. Each singles out and sanctions public discourse on politics - an area deep within the confines of the First Amendment. See, e.g., Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 223, 109 S.Ct. 1013, 1020, 103 L.Ed.2d 271 (1989) (citations omitted) ("the First Amendment has its fullest and most urgent application to [political] speech"). Clearly, Section 1462 does not apply to any other type of speech.[7] Consequently, the statute is not a content-neutral

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[5] Justice Blackmun wrote the plurality opinion that Chief Justice Rehnquist, and Justices White and Kennedy joined. Justice Kennedy filed a concurring opinion. Justice Scalia filed an opinion concurring in the judgment. Justice Stevens wrote the dissent, which was joined by Justices O'Connor and Souter. Justice Thomas took no part in the decision.

[6] Justice Scalia concurred in the judgment of the court. In doing so, he concluded that the regulation at issue was a reasonable viewpoint-neutral regulation of speech in a non-public forum. Justice Scalia concluded that the areas adjacent to a polling forum on or near election day do not constitute a traditional public forum and, thus the statute should not be subjected to the strict scrutiny standard. See Burson — U.S., ---, 112 S.Ct. at 1859-61 (Scalia, J., concurring) (citing Greer v. Spock, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976)).

[7] The court below noted that it would be permissible to advocate on the freedom of choice or even to sell Tupperware in the campaign-free zone.

time, place, or manner restriction and, thus, is subject to strict scrutiny.

[2] Moreover, the statute must still be constitutionally gauged under the strict scrutiny standard even tough it is viewpoint-neutral. See, e.g., Boos v. Barry, 485 U.S. 312, 319, 108 S.Ct. 1157, 1162, 99 L.Ed.2d 333 (1988) (viewpoint-neutral statute that prohibited use of signs within 500 feet of foreign embassies content-based); see also Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537, 100 S.Ct. 2326, 2333, 65 L.Ed.2d 319 (1980) ("[t]he First Amendment's hostility to content-based restrictions extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion on an entire topic").

In Burson, the state of Tennessee proffered two grounds upon which to support its compelling interest in a campaign-free zone: (i) the protection of its citizens' right to vote freely for the candidate of their choice; and (ii) the protection of the right to vote in an election that is conducted with integrity and reliability. The Supreme Court agreed that these interests were compelling, but the court noted that "[t]o survive strict scrutiny...a state must do more,... it must demonstrate that the law is necessary to serve the asserted interest." Id., --- U.S. at ---, 112 S.Ct. at 1852.

The court traced the longstanding history of election problems that fostered the need for reform, which led to the Tennessee statute in Burson, as well as Section 1462. See id., --- U.S. at ---, 112 S.Ct. at 1852-55. The court noted that the two-fold problem that these regulations were enacted to cure was: (i) voter intimidation; and (ii) election fraud. Id., --- U.S. at ---, 112 S.Ct., at 1855. Finally, the plurality concluded that "wide-spread and time-tested

consensus demonstrates that some restricted zone is necessary in order to serve the States' compelling interest in preventing voter intimidation and election fraud." Id.[8]

Louisiana State Representative Charles Lancaster, who authored the 1980 amendments to Section 1462, testified before the court below. The 1980 amendments expanded the campaign-free zone from 300 feet to 600 feet. Representative Lancaster testified that the statute primarily sought to guard against: (i) voter intimidation; (ii) voter harassment; and (iii) to provide unobstructed access to the polls. Lancaster testified that the problem largely emanated from poll workers, who bombarded voters in and around the polls. Apparently, it was common practice to use poll workers to inundate voters just prior to their entry to the polls. The legislature felt compelled to remedy the situation statutorily. The intent of the statute was to encourage voter participation. Under the statutorily created campaign-free zone, voters are free to vote without passing through a gauntlet of poll workers.

We conclude that Louisiana undoubtedly has a compelling interest to protect its citizens' right to vote. Burson reaffirmed that states have a compelling interest in protecting the right to vote — "a right at the heart of our democracy." Burson, --- U.S. at ---, 112 S.Ct. at 1851; see also Anderson v. Celebrezze, 460 U.S. 780, 788 n. 9, 103 S.Ct. 1564, 1570 n. 9, 75 L.Ed.2d 547 (1983).

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[8] The dissent interpreted the purpose of the statute somewhat differently reasoning that the statute served: (i) to protect orderly access to the polls; and (ii) to prevent last-minute campaigning. Id., --- U.S. at ---, 112 S.Ct. at 1861 (Stevens, J., dissenting).

ii. *Is the 600-Foot Limitation in Section 1462* Narrowly Tailored to Protect Louisiana's Compelling Interest?

Given the fact that Louisiana has a compelling interest in establishing a campaign-free zone, the question then becomes whether 600 feet is a valid limitation. Interestingly, Louisiana's statute is the second largest limitation in the country. Hawaii's 1,000-foot campaign-free zone is the largest in the country. See Haw.Rev.Stat. §§ 11-132 & 19-6(7)[9]

It is difficult to demarcate the point where the state's compelling interest in a campaign-free zone ceases and beyond which any content-based infringement becomes unconstitutional. The Burson court recognized this when it held "that some restricted zone around the voting area is necessary to secure the State's compelling interest." Burson, --- U.S. ---, 112 S.Ct. at 1856 (emphasis in original). Justice Blackmun tempered this statement when he reasoned "at some measurable distance from the polls...governmental regulation...could effectively become an impermissible burden akin to the statute struck down in Mills v. Alabama, 384 U.S. 214 86 S.Ct. 1434, 16 L.Ed.2d 484 91966)."[10]

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[9] Texas prohibits campaigning with a car microphone within 1,000 feet of the polling place on election day. See Tex.Elec.Code Ann § 61.004.

[10] In Mills, the Supreme Court struck down a statute that made it a crime for a newspaper editor to publish political editorials on election day. Mills, 384 U.S. at 220, 86 S.Ct. at 1437. Interestingly, the Mills opinion distinguished the present situation when it admonished "[w]e should point out at once that this question in no way involves the extent of a state's power to regulate conduct in an around the polls in order to maintain peace, order, and decorum there." Id. at 218, 86 S.Ct. at

(continued...)

The appellees contend that the state is not required to prove that the 600-foot zone is perfectly tailored, as long as it does not significantly impinge on constitutionally protected rights.[11] The Burson plurality concluded that Tennessee's campaign-free zone represented only a "minor geographic limitation" that did not significantly impinge upon constitutionally protected rights. Burson, --- U.S. ---, 112 S.Ct. at 1857. Justice Blackmun explained "we simply do not view the question whether the 100-foot boundary line could be somewhat tighter as a matter of 'constitutional dimension. Munro v. Socialist Workers Party, 479 U.S. 189, 197 [107 S.Ct. 533, 538, 93 L.Ed.2d 499] (1986). Reducing the boundary [line] *is a difference only in degree, not a less restrictive alternative in kind." Burson --- U.S.* at ---, 112 at 1857 (emphasis added) (citing Buckley v. Valeo, 424 U.S. 1, 30, 96 S.Ct. 612, 640, 46 L.Ed.2d 659 (1976)). This statement reflects the difficulty that lies in determining the exact point at which to draw the line, and it suggests that the plurality would have supported a 600-foot limitation.

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[10](...continued)
1436-37.

[11] The genesis of the "significantly impinge" language found in the Burson plurality's opinion came from Munro, 479 U.S. at 196, 107 S.Ct. at 537.

> [R]equiring proof that a 100-foot boundary is perfectly tailored to deal with voter intimidation and election fraud 'would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight, rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutional rights.'

Burson, --- U.S. at --- 112, S.Ct. at 1857 (emphasis in original) (quoting Munro, 479 U.S. at 195-96, 107 S.Ct. at 537-38).

The appellants point to the numerous exit-polling cases that have invalidated much smaller restrictions around polling areas. For example, in Daily Herald Co. v. Munro, 838 F.2d 380 (9th Cir.1988), the Ninth Circuit held a 300-foot restriction on exit-polling to be unconstitutional on its face. Id. at 389 (the content-based statute was not narrowly tailored). Daily Herald is representative of many cases holding that much smaller limitations do not survive strict scrutiny in the exit polling context. See, e.g., National Broadcasting Co., Inc., v. Cleland, 697 F.Supp. 1204, 1215 (N.D.Ga.1988) (holding 150-foot exit-polling limitation not narrowly drawn, but construed to be constitutional up to 25 feet). We reject the application of the exit-polling cases to the present context because the underlying state interests differ in each case. While there is no evidence of wide-spread voter harassment or intimidation by exit-pollers, there is evidence that poll workers do create these problems. Consequently, the state's compelling interest is called to greater heights in creating a campaign-free zone.

Further, Representative Lancaster testified that the 300-foot limitation, which preceded the 1980 amendments, did not prevent the continued hiring of poll workers. The 600-foot limitation was created to dissuade politicians from hiring poll workers. Poll workers were one of the principal causes of voter intimidation and harassment that was perceived to be causing low voter turnout. Further, according to Lancaster, the 600-foot limitation has served its purpose and poll workers are no longer used.

The Louisiana legislature tried to utilize a 300-foot campaign-free zone to protect its citizens' rights to vote. The legislature, thus, found a less restrictive alternative inadequate. Only after the 300-foot limitation failed to remedy the poll worker problem did the legislature take the next step to 600 feet. Therefore, we find that Section

1462's geographic limitation is narrowly tailored to achieve a compelling governmental interest.[12]

iii. *Is Section 1462 Substantially Overbroad?*

[3] The appellants next contend that Section 1462 is overbroad because it applies to: (1) the political speech of individuals not on the ballot ("non-ballot political speech"); and (2) buttons and T-shirts ("passive political speech").[13]

The appellants argue that Louisiana does not have a compelling interest in banning non-ballot political activity nor passive political speech around the polls. Appellees offer two defenses with regard to Section 1462's total ban on political speech: (i) if only ballot-related campaigning were proscribed voter intimidation and harassment problems

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[12] While we have found that Louisiana's campaign-free zone is narrowly tailored, we note that in Clean-Up '84 v. Heinrich, 759 F.2d 1511, 1514 (11th Cir.1985), the Eleventh Circuit held that a 100-yard (300-foot) campaign-free zone was unconstitutionally overbroad. Id. (cited by the Burson dissent).

Further, the only post-Burson case to directly address the campaign-free zone issue appears to be Calchera v. Procarione, 805 F.Supp. 716 (E.D.Wisc. 1992). The Calchera decision focused on the plurality opinion in Burson and noted the opinion's statement that at some point a campaign-free zone would be over-inclusive. The court held that the statute's 500-foot proscription was overbroad, and noted that it imposed a much greater infringement on the First Amendment that the 100-foot limitation addressed in Burson. See Calchera, 805 F.Supp. at 719-20. However, the Wisconsin statute in Calchera was found to prohibit homeowners from expressing their political views on their own property. The district court grasped on this factor to distinguish Burson. See id, at 720. There is no evidence in the record before us that the Louisiana statute is applied similarly.

[13] We will use the term "passive political speech" to refer to buttons and t-shirts.

would still exist because of enforcement and security problems; and (ii) solicitation for a recall petition has a greater disruptive potential than all other political speech.

The first argument, that suppression of ballot-related activity alone is insufficient, is rooted in the argument that ballot campaigners could achieve their ends by posing as non-ballot campaigners in order to gain access to the confines of the forbidden 600-foot radius. Representative Lancaster and Representative Accardo testified that an across-the-board ban on politicking was necessary to protect voters' rights because any exceptions to the total ban on political speech would necessarily create the need for on the spot enforcement.

Lancaster and Accardo stated that to allow any politicking in the campaign-free zone would open the door to subterfuge. If some people were allowed to engage in political speech in the campaign-free zone it would create two-problems: (i) on-the-spot enforcement decisions about what was proscribed by the statute; and (ii) increased security needed to weed out those engaged in ballot related speech.

To avoid this morass the legislature decided that a total ban was necessary. They reasoned that if they had to police the campaign-free zone to the extent necessary to weed out the disguised poll workers, then voters would still be intimidated and harassed. The heightened security itself would no doubt result in voter intimidation - the evil they sought to cure. Further, problems with on the spot decision making and varying degrees of enforcement would result in uneven application of the statute. Consequently, Section 1462 is not overbroad.

Justice Stevens, in his dissent in Burson, made the only known reference with regard to proscribing non-ballot

campaigning around polling areas. Justice Stevens noted that the Tennessee statute did not apply to "political debate and solicitation concerning issues or candidates not on the day's ballot." Burson, --- U.S. at ---, 112 S.Ct. at 1864 (Stevens, J., dissenting) (emphasis added). Stevens also noted that the Tennessee statute did not prohibit exit polling, leaflets, posters or buttons. He reasoned that these factors "severely undercut[] the credibility of [Tennessee's] purported law-and-order justification." Id. (Stevens, J., dissenting). These statements suggest that Justice Stevens would be more comfortable with an across the board ban on politicking in the campaign-free zone based on the same logic forwarded by Representatives Lancaster and Accardo. In any event, the issue of proscribing non-ballot campaigning was not an issue in Burson and appears to be an issue of first impression.

The appellees further argue that there is an important distinction between a recall petition and other campaign-related activity. In all other campaign activity the voter is free to exercise his rights in a secret ballot booth after having weighed and observed all campaigning activity whether it be far or near the polling venue. However, in the recall petition context, even if there is no recall on the ballot, voters must either sign the petition on the spot or the parties seeking their signature will immediately know that they have been rejected. The appellees contend that this renders the state's compelling interest to protect the voter to be even greater when weighed against the First Amendment rights of those seeking to forward the recall effort.

This argument is forceful and it is true that this distinction is meaningful. However, Section 1462 does not target only recall petitions nor does it even mention them. Further, there is no evidence that the legislature considered

the 600-foot limit with regard to recall petitions in 1980 when it was amended.[14]

Accordingly, we find that a total ban on politicking within the campaign-free zone is not overbroad. In fact, the total ban in the present context is the most defensible position. The state has a compelling interest in protecting its voters and the proffered reasons given by the legislature demonstrate a reasonable compromise to the problems that necessitated the campaign-free zone in the beginning.

iv. *Is Section 1462 Void for Vagueness?*

The appellants challenge Section 1462 on vagueness grounds contending that it is void because it is subject to discriminatory enforcement and fails to provide fair notice. The district court found that this issue would be better suited as a defense to a criminal prosecution. The Burson court treated this defense similarly when it stated "[i]n any event, these arguments are "as applied" challenges that should be made by an individual prosecuted for such conduct." Burson, --- U.S. at ---, n. 13, 112 S.Ct. at 1857, n. 18.

In light of our prior panel's certification to the Louisiana Supreme Court with regard to the statute's application to non-ballot matters it is clear now that the statute applies to non-ballot matters. However, there was some confusion created by some contrary attorney general opinions issued previously. In any event, the appellants do not appear to be in a position to assert this argument at this time.

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[14] Since the advent of this case Louisiana has enacted a statute that expressly creates a campaign-free zone applicable only to recall petitions. LSA-R.S. § 18:1300.6. We express no opinion as to the constitutionally of Section 1300.6.

CONCLUSION

Louisiana has a compelling interest in establishing a campaign-free zone. The 600-foot limitation is narrowly drawn and not an excessive infringement on the First Amendment. Thus, the geographical limitation survives strict scrutiny. Moreover, the statute creates a total ban on politicking within the zone. The need for a total ban is compelling and Section 1462 is not overbroad. Legislatures must necessarily compromise between two competing First Amendment interests in creating a campaign-free zone. Louisiana's zone has evolved over time and at present represents a constitutional compromise. Further, the appellants' void for vagueness argument is better left to another day. Therefore, the judgment of the district court is AFFIRMED.

APPENDIX C.

THEODOR A. SCHIRMER, et al, Plaintiffs — NUMBER 92-3000

Shelley E. Corrington,
Individually,
Et Al, Plaintiffs,
- Appellants

versus

EDWIN W. EDWARDS, Governor of the State of Louisiana, and in His Official Capacity, et Al,
Defendants - Appellees

United States Court of Appeal, Fifth Circuit

Before GARWOOD, DAVIS and JONES, Circuit Judges.

BY THE COURT:

Before the Court is the motion of Plaintiffs-Appellants for injunction pending appeal.

Plaintiffs-appellants are parties seeking to collect signatures on a petition for a recall election seeking the recall of Louisiana Governor Edwin Edwards pursuant to La. R.S. 18:1300.0, et seq. They seek to collect such signatures in the vicinity of polling places on the general election day of November 3, 1992. Plaintiffs do not seek to collect these signatures within any such polling places; they do apparently intend to vote while wearing clothing or buttons supportive of the recall effort. Neither the recall nor Governor Edwards is on the November 3 ballot, and plaintiffs do not seek to solicit any signatures, or conduct

any activity, with respect to any matter or proposition that is on the November 3 ballot. Defendants-appellees are the Governor of Louisiana, the Louisiana Attorney General, and the Secretary of State of Louisiana. They have taken the position that La.R.S. 18:1462A prohibits the activity in which Plaintiffs desire to engage within a radius of six hundred feet of the entrance to any polling place, even through none of the matters as to which signatures are sought and the activity desires to be conducted is related to any matter on the ballot.[1]

Plaintiffs brought this suit in the court below seeking a preliminary and permanent injunction prohibiting

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[1] Section 1462 provides:

"§ 1462. Acts prohibited on election day: electioneering; exception; enforcement; penalty

A. Except as otherwise specifically provided by law, it shall be unlawful for any person, between the hours of 6:00 a.m. and 9:00 p.m. to perform or cause to be performed any of the following acts within any polling place being used in an election on election day or within any place wherein absentee voting is being conducted, or wherein absentee voting is being conducted, or within a radius of six hundred feet of the entrance to any polling place being used in an election on election day or any place wherein absentee voting is being conducted:

(1) To solicit in any manner or by any means whatsoever any other person to vote for or against any candidate or proposition being voted on in such election.

(2) To remain within any such polling place or place wherein absentee voting is being conducted or within a radius of six hundred feet of the entrance of any such polling place, except when exercising the right to vote, after having been directed, in writing, by an election commissioner or law enforcement officer to leave the premises or area of a polling place or after having been directed, in writing, by a registrar or deputy registrar to leave the place wherein absentee voting is being conducted.

(3) To hand out, place, or display campaign cards, pictures, or other campaign literature of any kind or description whatsoever.

(4) To place or display political signs, pictures, or other forms of political advertising."

Defendants from denying to Plaintiffs what Plaintiffs contend are their rights under the First Amendment of the United States Constitution to engage in the above described activity, and contending that such activity is not prohibited by section 1462A. Defendants contend that the activity Plaintiffs desire to engage in is prohibited by section 1462A and that section 1462A, as so construed, is constitutional under the decision in *Burson v. Freeman*, 112 S.Ct. 1846 (1992). Plaintiffs contend to the contrary, arguing principally that the six hundred foot radius established by section 1462A is excessive as compared to the one hundred foot radius sustained in *Burson*, and that the state's interest in proscribing conduct such as theirs is attenuated because their proposed activities do not relate to any matter being voted on, unlike the situation in *Burson*.

On October 19, and 20 the district court held a two-day evidentiary hearing on both the preliminary injunction and the merits, at the conclusion of which the court orally rendered its findings and conclusions in open court. The district court ruled that section 1462A did apply to the activities Plaintiffs desired to engage in, and that the statute as so construed was facially constitutional under *Burson*.[2] The district court denied Plaintiffs' request for temporary and permanent injunctive relief and dismissed their suit with prejudice. Plaintiffs appeal to this Court. As noted, Plaintiffs have moved this Court to issue an injunction pending appeal enjoining Defendants

> "from enforcing La. R.S. 18:1462 against Plaintiffs in such a manner as to preclude Plaintiffs from:

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[2] The district court declined to rule on Plaintiffs' claim that the statute was being discriminatorily applied to Plaintiffs in certain particular instances, ruling that such discriminatory application should be addressed in state court proceedings, particularly those in defense of any prosection.

(a) during the period of absentee voting, October 22 through October 28, 1992, and on election day, November 3, 1992, circulating, while on public property limited to streets, sidewalks and parks in the vicinity of polling places, a recall petition sponsored by Recall '92 to call an election to recall the present governor of the State of Louisiana, Edwin Edwards; or

(b) voting, whether absentee or on election day, November 3, 1992, ,while wearing 'Recall '92' t-shirts, buttons or other articles of clothing . . ."

Plaintiffs argue in support of the motion for injunction pending appeal that if they are not granted such relief they will, as a practical matter, be forever barred from soliciting at polling places on behalf of the recall petition. This is because under La. R.S. 18:1300.1 *et seq.* all of the required signatures - in this instances approximately 750,000 minimum, a number that Plaintiffs apparently have not reached, - must be obtained within a 180-day period commencing with the initial circulation of such a petition, such period in this case ending on December 14, 1992 (as we understand it, no election is scheduled in Louisiana between now and December 14 except the November 3 general election). They also contend that polling places are a particular good place for them to seek signatures, because of the congregation of people there and the fact that under Louisiana law the petition must have exact information respecting the registered voter's name, ward, precinct, and address as these appear on the rolls of the registrars of voters in the states.

On October 27, 1992, we certified to the Louisiana Supreme Court the following question:

"Whether La. R.S. 18:1462A proscribed on election day, outside of the polling place itself but within a

radius of six hundred feet from the entrance thereto, all solicitation of signatures for a recall petition that is not on the ballot that is to be voted on at the election fort which the polling place is open, and in the polling place or said six hundred foot radius all wearing of clothing or buttons bearing visible words or symbols supportive of such recall?"

The Louisiana Supreme Court on October 29, stating that although "subsection (1) does not apply to the present case, we believe subsections (3) and (4) clearly proscribe the conduct at issue," answered the certified question as follows:

> "La. R.S. 18:1462(A)(3) proscribes on election day, outside of the polling place itself but within a radius of six hundred feet from the entrance thereto, all solicitation of signatures for a recall petition that is not on the ballot that is to be voted on at the election for which the polling place is open. La. R.S. 18:1462(A)(4) proscribes in the polling place or said six hundred foot radius all wearing of clothing or buttons bearing visible words or symbols supportive of such recall."

We conclude that Plaintiffs have shown the requisites for temporary injunctive relief pending appeal to the extent such relief is herein granted.[3] We have not hesitated to

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[3] We said in *Apple Barrel Productions, Inc. v. Beard*, 730 F.2d 384, 386 (5th Cir. 1984):

> "In order to secure a preliminary injunction, the movant has the burden of proving four elements: (1) a substantial likelihood of success on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is not issued; (3) that threatened injury to the movant outweighs any damage injunction might cause to the opponent; and (4) that the (continued...)

grant such relief ourselves in an appropriate case. *See Bran v. Independent American Savings Ass'n*, 838 F.2d 739 (5th Cir.1988); *Florida Businessmen v. City of Hollywood*, 648 F.2d 956 (5th Cir.1981); Fed.R.App. P. 8; 28 U.S.C. § 1651.

The record makes clear that there is a substantial threat that Plaintiffs will suffer irreparable injury if not allowed to solicit in the vicinity of polling places on November 3. A substantial part of this signature gathering strategy has been reasonably based on such anticipated

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[3](...continued)

injunction will not disserve the public interest. *Dallas Cowboy Cheerleaders v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1187 (5th Cir. 1979).

The decision to grant or deny a preliminary injunction lies within the discretion of the district court and may be reversed on appeal only by a showing of abuse of discretion. *City of Meridian, Mississippi v. Algernon Blair, Inc.*, 721 F.2d 525, 527 (5th Cir. 1983). The four prerequisites for preliminary injunctive relief are mixed questions of fact and law. In reviewing the actions of the district court of abuse of discretion, we uphold the district court's findings of fact unless clearly erroneous. Fed.R.Civ.P. 52(a). The court's conclusions of law, however, "are subject to broad review and will be reversed if incorrect." *Commonwealth Life Insurance Co. v. Neal*, 669 F.2d 300, 304 (5th Cir. 1982)."

In *Laurenzo v. Miss. H.S. Activities Ass'n*, 708 F.2d 1038, 1042 (5th Cir. 1983), we noted that for an injunction pending appeal the likelihood of success standard could be modified if a substantial case on the merits were presented and the equities weighed heavily in the movant's favor.

The district court here did not separately address the temporary injunction from the merits, although we can infer from its disposition of the merits that it found Plaintiffs had not met their burden under the first factor, "substantial likelihood of success on the merits." The district court did not address the other temporary injunction factors. In denying Plaintiffs' motion for injunction pending appeal, the district court simply referred to its decision on the merits.

solicitation.[4] The November 3 election provides one of their prime opportunities to gather signatures, and no other such opportunity will present itself before December 14, 1992, when this petition will be wholly invalid if the requisite number of signatures has not then been procured.[5]

Moreover, we conclude that should we deny Plaintiffs interim relief in this respect, the threatened injury to them outweighs any damage that granting such relief would cause Defendants, and that the granting of such relief would not disserve the public interest. The evidence

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[4] The "being voted on in such election" language of clause (1) of section 1462A suggests that such solicitation is not prohibited. Although clauses (3) and (4) are not so limited, construing them to cover such solicitation might have appeared to render clause (1) redundant. An October 5, 1990, unpublished opinion of the Louisiana Fourth Circuit Court of Appeal in *Nathaniel Lacour, et al v. State of Louisiana, et al.* o. 90-C-12772) held that solicitation of signatures for a petition for a recall election of certain local school board members was prohibited under section 1462A notwithstanding neither such matter nor the members in question were on the ballot. However, under Louisiana law unpublished opinions are not precedential, Louisiana Uniform Rules - Courts of Appeal, Rule 2-16.3, and the *Lacour* opinion is extremely brief and cites no authority. Until October 29, 1992, no other Louisiana court had spoken to the matter. Since *Lacour*, two Louisiana attorney general opinions, No. 91-597, November 12, 1991, and No. 92-650, September 24, 1992, held such solicitation not prohibited by section 1462A where the matter was not on the ballot, but did not cite *Lacour*. About a week before this suit was filed, the Louisiana Attorney General, in opinion No. 92-650(A), October 1, 1992, withdrew those two prior opinion and, relying wholly on *Lacour*, ruled that such solicitation was prohibited notwithstanding that the matter in question was not on the ballot.

[5] Plaintiffs also ask that we enjoin pending appeal any prohibition of their wearing "Recall '92 t-shirts, buttons or other articles of clothing" while voting on November 3. We do not believe that Plaintiffs will suffer irreparable harm or significant injury absent such relief; moreover, the interior of the polling place is a matter of greater interest to the state. We hence deny interim relief in this respect.

adequately shows that Plaintiffs intend to and are capable of conducting their solicitation properly and without disruption. Assuming the requisite likelihood of success, a matter discussed below, we cannot view the protection of such significant exercise of First Amendment rights as contrary to the public interest. *See Florida Businessmen* at 958.

We turn finally to Plaintiffs' likelihood of success on the merits.

We note that the distance prescribed by section 1462A is 600 feet, 6 times that sustained in *Burson*; the area involved is more that 1,130,000 square feet, approximately 36 times as large as that involved in *Burson* (31,400 square feet). This is greater than any state except Hawaii, which uses a 1,000 foot radius. Only two other states, Kentucky and Wisconsin, each five hundred feet, exceed three hundred feet. Some 37 or 38 states use 250 feet or less, some 25 of these using 100 feet or less. *See Note, Defoliating the Grassroots: Election Day Restrictions in Political Speech*, 77 Geo.L.J. 2137, 2146-47, 2196-2200 (1989). So far as we have been able to determine, Louisiana first has a specific protected zone outside the polling place in 1960, using a three hundred foot radius. La. R.S. 1534; Acts 1960, No. 221. These provisions eventually came into section 1462, which was amended in 1980 to increase the distance from three hundred to six hundred feet. There is no indication of any legislative history, legislative committee reports, or findings of any study or research to explain or justify the amendment.

The legislator who authored the amendment, a witness for Defendants, testified it was intended to substantially reduce the utility, and hence the use, of volunteer and paid campaign workers ("poll workers") contacting voters on their way to the polls. He testified that this was thought desirable for a variety of reasons: to avoid "making that one last attempt to influence a voter one way or another"; "many of these poll watchers were paid . . . .

[I]f we could do away with the poll workers it would save the candidates in our area a great deal of money"; the election commissioners were often busy trying to keep individuals out of the three hundred foot area; there were sometimes "altercations" between "workers of candidates running against each other"; "one of the reasons . . . for the law was not to have people hassled in any way at all when they go to vote to try to encourage higher voter participation"; to change the situation where "a lot of the things that were handed out on election day were not correct . . . . [W]hen that happens in an election, you don't have a chance to respond to it if it's done on election day because the election is over before you have any chance . . . ." He stated that "we don't have poll workers at election precincts any more. That was the real purpose of the legislation and it has generally achieved that objective.

Another representative, a witness for the Defendants, who was on the relevant committee and supported the 1980 amendment, testified that he did so "because in the district I live in, the 300 foot limit was very often not enough distance to keep people who were engaged in political activities from intersecting the voters who were going to the polls . . . . [M]aybe half of the precincts in my legislative district . . . . probably had parking lots which were outside of the 300 foot limits" and in such instances voters "as they got out of their cars and attempted to walk to the polls, very often were greeted by people handing out literature, people with signs, people trying to convince them that they should vote one way or another." He further stated "I think for some people it's intimidating" and "I think it might discourage people from voting" because "I think they generally would like to make up their minds on who they are going to vote for, what they are going to vote for or against, and not be bothered with last minute efforts to change their minds." He also stated that

> "ninety-five percent of the time . . . when people leave their houses, they've made up their minds on who they're going to vote for or what issue they are going to vote for or against and that's the way it ought to be. And, I think that it would be good that if on election day people had the time to consider all of the issues, consider all of the paraphernalia that's been handed out, all the campaign rhetoric, and to make up their minds in a logical way and not have last minute efforts to change their minds."

the witness further explained that although the six hundred foot limit did not wholly eliminate poll workers, with that limit "except in very rare instances" voters were no longer subjected to being contacted by such individuals after parking and while walking from their cars to the polling place.

Burson considerably relies on the consensus among the states. As Louisiana's is the second greatest restrictive zone of all of the states, using a radius twice the size of that in any of the forty-six of the states, *Burson* is to that extent less than strongly supportive of Defendants' position.

Although the state has offered some justification for the six hundred foot extent of its prohibited zone, these justifications as applied to political activity not related to any matter on the ballot have limited relevance to the core concerns relied on in *Burson*, which were protecting the integrity of the ballot from fraud and intimidation. Persons conducting political activity not related to a matter on the ballot have no incentive to attempt to prevent people from voting or to affect how they vote at the polling place, and the voters are certainly less likely to perceive that the activities of such persons are aimed at their voting or how they vote in the polling place. While there was evidence that it might be administratively confusing to distinguish between the two, this testimony was more in the way of

speculation as opposed to being based on actual experience.[6] There may be some reasons in the nature of prohibiting overcrowding or physical obstruction that would justify eliminating a broad range of conduct in the immediate vicinity of the entrance to the polling place. But nothing suggests that such justification would have any significantly realistic application to nonballot-related activities at anything near approaching the six hundred foot distance specified in the statute.

Prohibiting all political speech, whether or not ballot related, within a six hundred foot radius, may well be sufficiently narrowly tailored for *Burson* purposes.

We do not ultimately decide the merits of this case. But we are convinced that Plaintiffs have made a sufficient showing of a substantial case, with the equities being correspondingly in their favor, to justify a limited injunction pending appeal.

Accordingly, IT IS HEREBY ORDERED as follows:

Defendants, their agents and employees, and all persons acting in concert with them, are hereby enjoined, pending further order of this Court, from enforcing La. R.S. 18:1462 in such a manner as to preclude on November 3, 1992, the soliciting, on public streets, sidewalks or parks (or other outdoor public areas in which political solicitation is allowed under Louisiana law on days other than election or absentee voting days) not closer than one hundred feet to the entrance of any polling place, or persons to sign, or not to sign, a petition to call a recall election to recall Governor Edwin Edwards (or any other petition to call an election

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[6] There is no evidence that the legislature specifically considered this aspect of the matter, other that the wording of the statute itself. The legislator who sponsored the 1980 amendment increasing the distance to six hundred feet testified: "I do not recall specifically any discussion of anything other than the actual people being at the polls for or on behalf of a candidate of an issue to be voted upon. That was what we were addressing."

with respect to any person or proposition not on the November 3, 1992 ballot), provided such soliciting is carried out in a peaceable, quiet, and orderly manner.

Except as otherwise ordered, the request for injunction pending appeal is DENIED.

APPENDIX D.

THE SUPREME COURT
OF THE UNITED STATES

ORDER LIST

NOVEMBER 2, 1992

ORDER IN PENDING CASE

A-352

EDWIN W. EDWARDS, GOVERNOR OF LOUISIANA, ET AL. v. THEODOR A. SCHIRMER, ET AL.

The application for stay of injunction entered by the United States Court of Appeals for the Fifth Circuit presented to Justice Scalia and by him referred to the Court is denied.

APPENDIX E.

SUPREME COURT OF LOUISIANA

No. 92-CQ-2829

THEODOR A. SCHIRMER, ET AL.

v.

EDWIN W. EDWARDS, ET AL.

CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PER CURIAM

Pursuant to Rule XII of the Rules of the Supreme Court of Louisiana, the United States Court of Appeals for the Fifth Circuit certified the following question to this court:

> Whether La. R.S. 18:1462A proscribes on election day, outside of the polling place itself but within a radius of six hundred feet from the entrance thereto, all solicitation of signatures for a recall petition that is not on the ballot that is to be voted on at the election for which the polling place is open, and in the polling place or said six hundred feet radius all wearing of clothing or buttons bearing visible words or symbols supportive of such recall?

We granted certification, and now proceed to answer the question.[7]

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[7] We note that our opinion deals only with the question certified, and (continued...)

La. R.S. 18:1462(A) provides:

> **§ 1462. Acts prohibited on election day: electioneering; exception; enforcement; penalty**
>
> A. Except as otherwise specifically provided by law, it shall be unlawful for any person, between the hours of 6:00 a.m. and 9:00 p.m. to perform or cause to be performed any of the following acts within any polling place being used in an election on election day or within any place wherein absentee voting is being conducted, or wherein absentee voting is being conducted, or within a radius of six hundred feet of the entrance to any polling place being used in an election on election day or any place wherein absentee voting is being conducted:
>
> (1) To solicit in any manner or by any means whatsoever any other person to vote for or against any candidate or proposition being voted on in such election.
>
> (2) To remain within any such polling place or place wherein absentee voting is being conducted or within a radius of six hundred feet of the entrance of any such polling place, except when exercising the right to vote, after having been directed. in writing, by an election commissioner or law enforcement officer to leave the premises or area of a polling place or after having been directed, in writing, by a registrar or deputy registrar to leave the place wherein absentee voting is being conducted.
>
> (3) To hand out, place, or display campaign cards, pictures, or other campaign literature of any kind or description whatsoever.

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[7](...continued)
we do not pass on any issues of constitutionality under either the United States Constitution or the Louisiana Constitution.

(4) To place or display political signs, pictures, or other forms of political advertising.
[emphasis added].

We find the clear intent of this statute, when taken as a whole, is to prohibit political activity within 600 feet of the polls on election day in order to prevent disruption of the polling place and the election process. Although we agree that subsection (1) does not apply to the present case, we believe that subsections (3) and (4) clearly proscribe the conduct at issue. Subsection (3) prohibits the handing out, placement or display of campaign literature "of any kind or description whatsoever." We find the solicitation of signatures for a recall petition not on the ballot at that election, but which its backers ultimately hope to get on the ballot, fits this broad definition of handing out or displaying campaign literature. Likewise, we hold the wearing of clothing or buttons supporting such a recall effort is a display of political advertising prohibited by subsection (4). Accordingly, we answer the certified question in the affirmative.[8]

DECREE

For the reasons assigned, we answer the certified question as follows:

> La. R.S. 18:1462(A)(3) proscribes on election day, outside of the polling place itself but within a radius of six hundred feet from the entrance thereto, all solicitation of signatures for a recall petition that is not on the ballot that is to be voted on at the election for which the polling place is open. La. R.S.

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[8] We note that Attorney General of Louisiana, in opinion no. 92-605(A), reached a similar conclusion, as did the court of appeal in an unpublished opinion, Lacour v. State of Louisiana, 90-C-1772 (La.App.4th Cir.1990).

18:1462(A)(4) proscribes in the polling place or said six hundred feet radius all wearing of clothing or buttons bearing visible words or symbols supportive of such recall.

It is ordered that, pursuant to Supreme Court Rule XII, § 9, the clerk of this court send this judgment under the seal of this court to the United States Court of Appeals for the Fifth Circuit and to the parties.

Dennis, J., concurs. Although the statutes does not prohibit pure speech or political activity disassociated from the election at hand unless it is combined with political advertising or the display or distribution of campaign literature, the Plaintiffs in the present case seek to carry out such a combination of activities on election day.

APPENDIX F.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

Theodor A. Schirmer, et al
Plaintiff,

Civil Action
Number 92-868-B

versus

Edwin W. Edwards, et al
Defendant

JUDGMENT

For the oral reasons assigned:

IT IS ORDERED AND ADJUDGED that judgment shall be entered in favor of the Defendants and against the Plaintiffs dismissing the Plaintiffs' federal law claims with prejudice and dismissing their state law claims without prejudice.

Baton Rouge, Louisiana, October 21, 1992.

s/ Frank J. Polozola
United States District Court

APPENDIX G.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

Theodor A. Schirmer, et al Plaintiff,	Civil Action Number 92-868-B
versus	
	Volume Five 7:00 - 8:10 p.m.
Edwin W. Edwards, et al Defendant.	October 20, 1992 Honorable Frank J. Polozola

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Transcript of the Court's Findings of Fact and Conclusions of Law in the above-entitled and number civil action.

(CA 92-868-B, October 20, 1992, 7:00 p.m.)

And as noted in the Burson case, and as I have been saying throughout this case, the real question then is how large a restricted zone is permissible or sufficiently tailored.

Plaintiffs in this case contend that even if the statute is valid, 600 feet is totally unreasonable.

Before I get into the reasonableness or unreasonableness of the 600 feet, I think it is important for the Court to go into the issue of whether or not the activities of the plaintiff involved in this case are, in fact, covered by the statute. I think the statute is clear. I think the statute says that it is illegal to place or display political signs, pictures or other forms of political advertising without any limitation as to whether or not the matter is or is not on the ballot.

The statute says that it is illegal and unlawful to hand out, place or display campaign cards, pictures or other

campaign literature of any kind or description whatsoever. So I think the statute was definitely, on its face, clear in meaning designed to deter any type of political activity of any kind within 600 feet of the entrance to any polling place used.

Now, several members of the legislature testified in this case. Secretary of State McKeithen testified. The Commissioner of Elections testified involving this particular case.

It is clear to me that when you analyze this testimony that there was definitely concern of the legislature. This goes into the reasons why they might pass as compared to determining what the statute means.

As I said before, I am aware of the limitations what the Supreme Court has placed on District Courts and other Courts in looking at legislative history when the clear words of the statute have but one meaning. And I think the meaning of these particular words are very clear.

But I still think it is necessary for the State to set forth the reasons why it enacted such a statute and why it prohibited all types of activity. Mr. Accardo, for example, when he testified indicated that 300 feet was not enough distance because many of the voting places in Louisiana have parking lots that were outside the 300 foot limitation. Mr. Accardo, who is currently chairman, and has been chairman of this committee off and on for many years during the time that he was in the legislature, indicated that there were instances when political activity was going on, that when people drove to the polls they were handed out literature. There were people who were paid to be at these particular entrances to the voting places to hand out cards. There was food. People began to complain and, under his interpretation of what the legislature did, he said no political activity of any kind was to be conducted. In other words, any political activity was covered whether on the ballots or not. Mr. Accardo gave some various examples, examples

being that he, himself, if he wanted to run for re-election, although he wasn't on the ballot, could be out there. Other candidates could be out there. There was much concern in various responses to the questions that I and the attorneys raised as to whether or not people, for example, who were for or against gambling, for or against abortion, for or against other issues that might come up, cd all be present within the zone, whether it is 300 feet, 600 feet or what have you, to talk to voters, to cause voters to listen to their particular messages. And the testimony that I heard seems to indicate to me that this does nothing but intimidate, confuse and possibly even deter voters from coming to vote at the polls.

The fact that there are commissioners present at the voting booths on election day does not necessarily resolve the problem. Representative Accardo said that these people involved as commissioners are very busy. They have little time to work outside, and it is very difficult to let them determine what is or what is not good or bad. The purpose is to say that all political activity has been banned.

Originally Louisiana was at 300 feet. Later they moved to 600 feet. Various reasons were given, all of which pertained to allowing the voter to come and encouraged to come to vote in a situation that is not intimidating, that would not discourage voters to come to vote, to be confronted with people who were there, were being paid to hand out various political literature. According to the evidence of both Mr. Lancaster and Mr. Accardo, as well as other witnesses who testified, since the 600 feet limitation has been set, the large problems that were involved earlier regarding poll workers and what you have all but subsided at the various precincts.

The Secretary of State, McKeithen, who testified in regard to some confusion over a ballot involving a white candidate and a black candidate, and petitions being involved in that matter indicated that that was a problem that

he felt like would deter the voters from coming to vote even though that matter was not necessarily on the ballot.

There were other problems involved that people discussed, but in summary, the issue I believe is not for me to determine whether the legislature was absolutely right or absolutely wrong. I don't think that is the test that the Supreme Court sets forth in the Burson case. The question is not whether it is perfectly tailored to deal with voter intimidation and election fraud but whether or not the action taken, 1) was taken by the State because the State found it necessary to secure a compelling State interest; 2) that it did not significantly impinge on constitutionally protected rights of the plaintiffs in this particular case.

Considering all the testimony involved in this particular case, reading the clear words of the statute, and considering what each of the legislators who either were the author of the bill or a member of or the chairman of the committee testified to, the sole purpose of increasing the zone from 300 to 600 was to keep the political influence away from voters, to give voters plenty of time to have privacy, to protect the sanctity of polling places, to keep the poll watchers away from the various precincts, and by doing so, to encourage voter participation and let voters know that they could vote at the polling place without being intimidated harassed or what have you.

So, the Court finds, as I noted earlier, that the statute is, in fact, designed to control all political activity whether or not the activity is on the ballot or not.

There is one case, it is not reported, the parties have referred to it in the briefs. The Fourth Circuit, the Louisiana Fourth Circuit Court of Appeal in Nathan LaCour versus the State of Louisiana issued an unpublished opinion. Whatever effect this has, I don't know. I don't know if this can be relied on by this Court, but the Court does believe that it is worth mentioning. In the opinion wherein the Fourth Circuit, and this is the only case that I have been

able to find or any counsel have been able to find regarding this particular issue, but the Fourth Circuit in dissolving an injunction that had been previously granted by a lower court stated the clear intent of LSA-R.S. 18:1462 is to prohibit any and all political activity within 600 feet of the polls on election day. Especially pertinent to the instant controversy is sub-section 2 of that statute which allows election officials or law enforcement personnel to force persons to leave the premises after issuing written notice. Additionally, Sections 3 and 4 prohibit the distribution of all campaign literature of any kind or description whatsoever as well as the display of other forms of political advertising. Although the recall petitions involved here are not related to the current election, the statute was obviously designed to prevent the disruption of the polling place through any political activity including that contemplated by the petitioners in this case. Petitioners may distribute recall petitions at a distance greater than 600 feet from polling places used in the election of October 6th and November 10th of 1990. The temporary restraining order issued herein is annulled, dissolved and recalled.

Now, having concluded that the activity of the plaintiffs involved in this case are covered by the statute, that the state could create a zone, that the zone created prohibits the activities of the plaintiffs involved in this case, the question is whether or not the 600 foot limitation is reasonable under the facts of this particular case.

The Supreme Court in the Burson case did not set forth any specific guidelines but it is important to note one thing that I think is particularly important. And representative Accardo referred to this in his testimony.

Representative Accardo noted that many of the polling places in Louisiana are more than 300 feet from where the parking lots are located. And one of the things that voters had complained to the legislators was the fact that they were being harassed or intimidated or given

material by these poll workers and other people who wanted to pass out various campaign literature. For that reason, Representative Accardo noted that the distance was increased from 300 to 600 feet to allow a voter to park his car, walk out of his car, and walk to the polling place.

One of the things that the Supreme Court noted at page 1856 of its opinion was that elections vary from year to year and place to place. It is therefore difficult to make specific findings about the effects of a voting regulation. And moreover the remedy for a tainted election is an imperfect one. Re-running an election would have a negative impact on voter turnout. Thus, requiring proof that a 100 foot boundary is perfectly tailored to deal with voter intimidation and election fraud would necessitate that a state's political system sustain some level of damage before the legislature could take corrective action. Legislators, we think, should permitted to respond to potential deficiencies in electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.

In this case involving these particular people, the recall people, there has been evidence that on various occasions whether at a side street in Orleans or Jefferson Parish, whether at the Superdome, whether in North Louisiana or South Louisiana, that there have been certain hostilities between those that support and those that oppose the activities of the recall committee.

As I said earlier, I don't think that the State has to wait for something to happen before taking action to prevent it. It is the same thing that the Supreme Court said many years ago in a case that they decided back in 1986 in Munro versus Socialist Workers Party.

In this particular case, the question is, is 600 feet a reasonable exercise of the authority of the State insofar as a compelling state interest or is it such that it truly impinges

on the rights of the plaintiffs and others who might wish to get involved in this particular case.

There are several exceptions set forth in 1462. The question is, are there alternatives? You know, what other alternatives does the State provide to those who want to do whatever activities might be involved in the political process? For example, 1462 does not apply to the placing and displaying either by the owner, lessee or lawful occupant thereof or with the consent of such owner, lessee or occupant, of political signs or pictures on private property which is not being used as a polling place. This particular exception, for example, would allow those homeowners who live within 600 feet of the polling place and who own private property, or lease private property, or who are lawful occupants of private property, to allow any type of political sign they wish to have on their property including allowing the recall people or any other group to be on their property to campaign in such a manner that they might wish within the applicable laws of the State of Louisiana.

The legislature, for example, has said that people who possess alcoholic beverages can't be at a polling place. There are various reasons for this because of disruption caused by people in polling places. In looking at some of the history that was provided--and it really wasn't legislative history so much as it was a history of the various acts enacted--there were times when some of the statutes provided that the bars could not even open until a certain time, if at all, on election day to avoid people who were intoxicated from voting or even having people drink and then not know what they are doing at the polling place.

There are other particular statutes involved where the legislature has limited various things. For example, in 1462 political material--there is a statute that says that the legislature of Louisiana finds that the State has a compelling interest in taking every necessary step to assure that all

elections are held in a fair and ethical manner and finds that an election cannot be held in a fair and ethical manner when any candidate or other person is allowed to print or distribute any material which falsely alleges that a candidate is supported by or affiliated with another candidate, group of candidates or other person or political faction to publish anonymous statements that are scurrilous, false or irresponsible adverse comment about a candidate or a proposition. The legislature further finds that the people of this State have a right to know and that among other things that it is essential to the protection of the electoral process that the people know who is responsible for such publications in order to more properly evaluate the statements contained in them and to informatively exercise the right to vote.

There are some other statutes involved that I don't need to get involved with. For example, Section 1534 which is the old statute leading up to the--which is now 1462 and 1464--dealing with various things that were prohibited and what the poll watchers and people who are working the polls could or could not use during the course of the election process.

In short, the matter involved in this case is whether 600 feet for a period of 6 a.m. to 9 p.m. at a certain polling location is an unreasonable or significant impingement on the constitutionally protected rights of the recall people and plaintiffs in this particular case.

In trying to decide this, the Court again has to fall back on what Burson said. Burson says we do not think that minor geographic limitation prescribed by Section 2-7-111-B constitutes such a significant impingement. Thus, we simply do not view the question whether the 100 foot boundary line could be somewhat tighter is a question of constitutional dimension. Reducing the boundary to 25 feet as suggested by the Tennessee Supreme Court is different only in degree and not a less restrictive alternative in kind.

The Court further stated that at some measurable distance from the polls, of course, governmental regulation of vote solicitation could effectively become an impermissible burden, akin to the statute struck down in Mills versus Alabama.

In reviewing challenges to specific provisions of the State election laws, however, this Court has not employed any litmus paper test that will separate valid from invalid restrictions. Accordingly, it is sufficient to say that in establishing a 100 foot boundary, Tennessee is on the constitutional side on the line.

I don't see how a 600 foot limitation affects the rights of the people involved in this case. Obviously there is a balancing test that the Court has to consider. The balancing test is the right of a voter to vote in a manner that he is not intimidated, confused, in a manner that fraud does not occur, balancing that with the right of others who wish to proceed at this particular boundary line--within this boundary line.

Louisiana does have a 600 foot limitation. Previously it was 300 feet. The Court has listened to the testimony in this case and the Court believes that valid reasons were given which to me suggest common sense on the part of the legislature to prevent the things that were being done that the legislature was currently aware of.

And the question is, given the conflict between the right to vote in a manner that is free of intimidation, fraud, confusion; in a manner that doesn't discourage voter participation but, in fact, encourages voter participation; given that conflict versus the right of the people to petition, I believe that it was a common sense approach to establish a restricted zone around polling places to ensure and protect the fundamental right of a citizen to vote in an election. And as the Supreme Court stated in the Burson case, given the conflict between these two rights, the right to vote, the right to pass out political material, we hold that requiring

solicitors to stand 100 feet or in my case 600 feet from the entrances to polling places does not constitute an unconstitutional compromise.

I think in this case the 600 foot does not significantly impinge on the constitutionally protected rights. It is reasonable. The Court believes that this area is necessary to secure the State's compelling interest. The argument has been made that other states have various distances from 30 feet to 1,000 feet. The important thing is going back to what the Supreme Court said in the Burson case. Elections vary year to year and place to place. It is therefore difficult to make specific findings about the effects of voter regulations.

In this particular case there is not a significant impingement on the rights of the plaintiffs. If they have as much support as they testified they have, and with the statute suggesting that if you are on private property, even if the private property is within the 600 foot zone, you can be on this private property, these individuals have that right to go on to private property. They have the right to go within 600 feet. While some evidence was introduced at the trial to show that 600 feet was some distance from some of the polling places that were introduced on the tape, Representative Accardo said many, many other places in the State of Louisiana have voter polling places that are significantly further than 300 feet because of the parking distances so far away from the polling place.

Considering all these activities and knowing that it is not necessary nor required that the State produce proof that the boundary selected in this case, 600 feet, is perfectly tailored to deal with voter intimidation and election fraud, then the Court believes it is constitutionally permissible under the facts of this case.

One thing that I keep repeating, I think two or three times in this case, and I think it bears worth repeating that successful voter intimidation is successful precisely because

it is difficult to detect. To me to substitute my judgment of whether 100 feet to 600 feet is too much or too little simply would require me to engage in speculation when the more important issue is whether or not this restriction on election day, for example, for a total of 13 hours would significantly impinge the constitutional collective rights of a group who have 180 days to do whatever they wanted to do.

Yes, the Court did express concern in this case about if the statute was truck down or if there were no limitations at all, what effect it would have on voters if various groups of people came to express their various concerns. I think Representative Accardo referred to having people walk through a gauntlet to reach the voting booth.

What is significant was the three cases that I read, I think that may have been cited in the Supreme Court opinion. This dealt with labor elections. And what was significant to some of these were people who were not involved in the elections, who were not even employees, who could not even vote, were engaged in activities such that the various courts struck down the election. What did they do? Some of them were just talking to people who were in line to vote outside of the poll wearing marks suggesting they should or should not vote, telling the people--just talking to people as they walked through the election process. What was significant was in one of the cases and I will get to it in one second or two that even said standing in line was an extension of the voting polling booth such that when they started talking to people who were in line, it was such intimidation that the election should have been voided.

The cases are NLRB versus Carroll Contracting and Ready-Mix, 636 F. 2d 111, 1981. The Court held that the board further argues that the electioneering was not improper because it occurred outside the polling place. We are not convinced. As stated by the board in the Milchem case, the last few moments before voting should be the

voters own, as free from interference as possible. We do not find that this protection from interference is reserved only for those employees who have gained access to the action polling place to case their votes.

Once the polls open, the employees waiting outside in line to vote became a part of the polling place and were entitled to the safeguards against interference espoused in Milchem.

In the Season-All Industries, Inc. versus NLRB case similar language was used by the Court in that case. What is significant in both this case and in Midwest Stock Exchange versus National Labor Relations Board is the fact that people who were not involved in the election but who came to solicit voters, to talk to those who had to vote in the elections, were found to have violated the various rules involving union elections such that the elections were set aside.

In each of these cases, the courts went so far as to emphasize the right of the voter, even though it was an election in connection with a union election, to be free from intimidation, to be free from harassment, to have the last minutes of voting in such a way that it doesn't destroy their right nor the atmosphere that they should have in voting.

For example, in the Season-All case at page 940 the Court held that Carroll realizing that board policies prohibited electioneering at or near the polls denied enforcement of the board's order. Our reading of Carroll indicates that the Fifth Circuit does not restrict the per se rule of Milchem to parties but holds that even a non-party who disrupts the voting procedure or destroys the atmosphere necessary to the exercise of a free choice in an election, warrants the setting aside of the election. We agree that in establishing and maintaining the laboratory conditions conducive to an election no conduct disruptive or destructive of the exercise of a voter's free choice can be

tolerated regardless of whether the actions are those of a union agent or mere employees.

The reason I cited these cases is I think one of the counsel for plaintiffs referred to the fact that no voter should be--needs to be, have this vacuum where they can't be, can't be harassed or what have you by anybody or be solicited by anybody. And I think these cases, though they are involving union elections, strongly suggest that such is not the case and the reason I cite these cases and the language in them is because the Supreme Court in the Burson case at Page 1855 specifically referred to the fact that the National Labor Relations Board also limits activities at or near polling places in union representation elections.

The final issue or the final issues that the Court has to determine is whether or not the material such as the T-shirts, badges, signs or other literature are covered by the statute in this particular case.

The argument is that a mayor candidate wore a T-shirt and he allowed to vote whereas people who wore recall shirts either were not allowed to vote, were required to either take off their T-shirt or to turn it around. And the issue becomes whether or not a statute which is valid on its face becomes invalid because of the manner in which it is applied.

I think in this particular case the T-shirts and the materials that I see in this particular case do come within the clear meaning of the statute insofar as Sections 3 and 4 are concerned. The statutes clearly say it is unlawful to hand out, place or display campaign cards, pictures or other campaign literature of any kind or description whatsoever or to place or display political signs, pictures, or other forms of political advertising.

The issue that I have to decide is not whether Louisiana or the poll watchers or the commissioners are doing their job properly. The issue is whether or not on the face of the statute this statute is or is not constitutional and

whether or not the shirts and the pins and the political signs are or are not the type of literature and campaign material that were clearly prohibited by Section 1462.

I find that it is. Now, is it up to this Court to say, okay, State of Louisiana, you have to enforce?

I got involved in the jail case. I have been involved in the jail case twenty years. There is no effort on the part of anybody involved in this case to say now that this federal court or this particular Judge has to now get involved with the electoral process.

This is a matter that needs to be supervised by those in charge of the election process in the State of Louisiana, whether it is the Secretary of State, the Commissioner of Elections, Clerks of Court, Commissioners who are duly appointed, the Legislature, the Governor, the Attorney General or whomever. It is not for me.

It seems to me the candidates also have a right to request that these statutes be enforced fairly and what have you.

So the question becomes what if a person such as Mr. Schirmer who is given a ticket, or a summons I should say, for refusing to leave, and he now challenges this statute on the grounds that people who drive up into the parking lot with signs saying vote for or against a certain candidate--they haven't been prosecuted. People who, such as the Mayor candidate who wore his T-shirt, were allowed to vote. I think as the Supreme Court said that these arguments are as applied challenges that should be made by an individual prosecuted for such conduct. And I think Mr. Schirmer has the right, and I know the ability, to raise this in his criminal trial and it is not necessary for me to engage in this particular process. So to the extent that this complaint requests the court to issue a declaratory judgment allowing these particular plaintiffs or others to wear political t-shirts of any kind while they vote, the request is denied.

Whether or not it is going to be applied fairly is a question for the commissioners and others who run these elections.

The sole issue before the Court is whether or not this particular statute is constitutional on its face. I find that it is. It is clear that this statute as was the Tennessee statute to use the words of the Supreme Court, it is neutral on its face insofar as the type of activity it applies. It is not siding with one side or the other insofar as the language of the statute is concerned.

In other words, it is not a facially content neutral time place or manner of restriction. We are dealing only with political activity in this particular case and I think the statute on its face is constitutional.

So, in summary, the Court finds that the activities involved by the Recall group and the other plaintiffs are political in nature and, therefore, come within section 1462.

The Court states that the State of Louisiana can constitutionally create a zone, a campaign free zone around the polling places of this State.

The Court finds that section 1462 covers both those things that are on the ballot as well as those that are not on the ballot.

The Court further finds that the 600 foot limitation is a reasonable limitation that does not impinge on the rights of the plaintiffs in this particular case because of the very limited time involved together with the other exceptions that are involved and the fact also that outside of 600 feet these parties can engage in any conduct they wish insofar as solicitation of votes.

The Court finds that the materials such as those presented to the Court, the t-shirts, the badges, the signs are covered by section 1462.

The Court finds that the statute is valid on its face.

The Court declines to rule on whether or not as applied to Mr. Schirmer the statute is or is not valid. That is for him to raise in his state court proceedings.

The final thing I want to say is this. There has been some argument that, you know, you can call the police. Well, one of the statutes that I didn't quote says policemen really aren't supposed to be in the zone unless it is absolutely necessary because of the influence that they have had or apparently according to Mr. Accardo and others on elections.

But the critical thing that I am concerned about is you can go and call the police, but how many people are going to take the time to stand in line and be harassed or intimidated or discouraged from voting. How is the Court or the Legislature or the plaintiffs or the defendants in this case going to discover undetected, or less than blatant acts which may nevertheless drive voters away before remedial action can be taken?

I think it is this type of concern that the Supreme Court expressed, the type of concern that successful voter intimidation is successful because it is difficult to detect, the concern that voters ought to be free to vote without being harassed or intimidated or discouraged, to eliminate voter fraud in elections, to ensure that the elections are conducted in a free and lawful manner, and as the Court said, without having the federal court engage in a litmus paper test that will separate valid from invalid restrictions.

Considering all the evidence in the case, the Court finds that what the Legislature did in this case was common sense, but more important was constitutional.

And these are the Court's findings of fact and conclusions of law. The Court reserves the right at a later date to supplement its oral reasons with written reasons.

The Court will enter a judgment dismissing plaintiffs' suit with prejudice. The Court will try to enter the

judgment tomorrow sometime so that the process can continue.

I know insofar as appeals are concerned one of the things that we need to do is get transcripts. I would hope that everybody understands that this is not a pauper case, that reporters need to be compensated. Particularly in political cases it gets to be a very difficult problem. So I would hope that anybody who wants transcripts or designation of transcripts that you all would cooperate with the court reporter because it is important that we get this out this week if we can because there is a very big case starting next week, six to eight week case. And it gets difficult to do transcripts when you are in a courtroom. So I would hope that everybody cooperates with the court reporters and my clerk in getting the record together to go up on appeal.

Everybody knows how to take an appeal, and we will just go from that.

I do want to say one thing and I say this with sincerity. At the beginning of the case, I raised a concern about Mr. Schirmer representing everybody and then also being a plaintiff. This was not any attempt on my part to suggest that what Mr. Schirmer was doing -- he was trying to do something intentionally to cause a problem. I know his zeal to represent a client of this nature and what have you.

On the other hand, I have the obligation to ensure that the Rules of Professional Conduct are complied with and I think the manner that we worked this out was satisfactory to all parties. I don't think that Mr. Schirmer or his clients were affected by the role that he had to play. I think that he asked all the questions he wants to and, obviously, he had capable counsel. I don't apologize for raising the issue, but I do want that to be reflected that I just think we have these rules to follows and until somebody else changes them, I think we need to do it and it is in our local rules. So I think the compromise that was made or the

procedure that was followed, I should say, was an appropriate procedure. You might want to think about this the next time before you jump in and get involved. You know, maybe let somebody else play the role of getting the ticket or play the role of the plaintiff or play the role of attorney because I think it could cause some problems with the Bar Association.

Mr. Schirmer: I am preparing a letter now, your Honor, to have a clarification for the Bar, specifically on that issue.

The Court: Okay. Well, I think it worked out okay here, and I am not doing anything with the Bar Association. But I just thought we had to do it.

The final thing I want to say is I do appreciate the cooperation that counsel from both sides gave to each other and to me. We put this case on a very fast track, and if we learned anything in this case, and I really think we did, and I am reinforced in my total belief not that a pre-trial order is required in every case. I don't care how simple we think cases are, I think we need a pre-trial order. And I just think it helps -- there are two cases in a row that didn't work. You know, I am now convinced we need a pre-trial order.

But I do want to thank you all for getting the witnesses up. I know state officials have a lot of obligations, but I think to get the people here the way we did and to take people out of order, I think that speaks well for the lawyers in the case. And I think it is refreshing to see that. I get aggravated, as you can tell, when things get out of hand in a courtroom, but on the other hand if I don't do it, who is going to do it?

I just like to run a very strict courtroom with a lot of decorum and I don' think I am ever going to change in that regard.

Okay. We stand at recess.

(Recessed at 8:10 p.m.)

APPENDIX H.

NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
CRIMINAL SECTION I

STATE OF LOUISIANA
VS. NUMBER: 5-93-133
THEODORE A. SCHIRMER

TRANSCRIPT OF RULING ON MOTION TO QUASH
MONDAY, JULY 19, 1993
THE HONORABLE RALPH E. TYSON,
JUDGE PRESIDING

APPEARANCES:

CARSON MARCANTEL : FOR THE STATE

MARK UPTON : FOR THE ACCUSED

REPORTED AND TRANSCRIBED BY
LANELL DIDIER
OFFICIAL COURT REPORTER

MONDAY, JULY 19, 1993

[. . .]

THE COURT: I think, both sides can agree that the statute in a real sense brings two of our most basic constitutional rights almost head to head. The right to free speech, freedom of expression is butting up against the right to vote. Both of which are basic and fundamental and essential rights in a democracy. The issue is whether the state in deciding

that the right of free speech, free expression, or in this case, political expression, stops 600 feet from the voting booth, whether the state is--whether there is a rational basis for that determination and whether the state's election to put the bar at that point is reasonable and is a reasonable restriction of the corresponding--a reasonable enforcement of the right of citizens to vote. I have been reading Burson versus Freeman which is the United States Supreme Court case that apparently is the latest expression on that point, and I've been reading it over the weekend and different points of the testimony today. In that case Tennessee's 100-foot boundary was challenged as being an unconstitutional infringement upon the right to vote. Tennessee has--and from what I understand from the opinion and from other resources almost every state in the union has some prohibition on campaign activities within a certain distance from the polls. In Tennessee it was 100 feet. And pretty much the same activities as are covered in 1462 were prohibited in Tennessee in that 100-foot space. The Supreme Court in the Burson base found that the 100-foot boundary was not unreasonable. Specifically they stated that in establishing a 100-foot boundary Tennessee is on the constitutional side of the line. Whether that means that 99 feet is too close of 101 feet is too far, I don't know. It also appears from that opinion that the majority of the states enforce a 100-foot boundary, I think, Louisiana is--well, I think, Hawaii is number 1 with a 1000-foot boundary, and Louisiana is number 2 with a 600-foot boundary, and the majority of the states, I think, fall around the 100 to 250-foot boundary. In reaching their decision in the Burson base the Supreme Court didn't really give you a whole lot to go on other than to say there is nothing wrong with a hundred feet. It did state legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively provided that the response is reasonable and does not significantly impinge

upon the constitution of protecting rights. And they go on to say that at some measurable distance from the polls governmental regulation of vote solicitation could effectively become an impermissible burden akin to a statute which was struck down in Miller versus Alabama which I also read dealt with a statute that prohibited publishing newspaper editorials pro or con on election day. The Court quickly struck that down. More recently the Fifth Circuit in Schirmer versus Edwin Edwards which, I think, is the federal counterpart of this particular matter noted that the Louisiana statute is six times the distance that was covered in the Supreme Court decision in Burson, and the area covered by the 600-foot limitation is approximately 36 times as large as the area that was covered in the Burson case, and as I indicated before that we're second only to Hawaii with a restricted radius of 600 feet. The testimony that has been presented of course indicates that the officials charged with enforcing these limits apparently have to wrestle with them every election. But I really didn't hear anything that they have a problem with--that they had a problem with at 100 feet which was the limit in November that would not have also been a problem at 600 feet. That was the reason for my question to Mr. Fowler whether the 100-foot limit which the state was forced to use in November presented an problems--or any different problems than they had in prior elections when the limit was 600 feet. And it was my appreciation of his testimony that there was no unique problem, nothing that they wouldn't have had the distance been six times greater. The fact that the limit was increased to 600 feet following--was that the '72 election with Lambert? That may be the reason that it was increased to that distance, but the Court just doesn't see a rational basis for that greater distance. In your Motion to Quash you allege that the statute is unconstitutional because of overbreadth, that it goes farther than necessary to achieve the result that is desired. And insofar as that refers to the

fact that political activity is prohibited within 600 feet of a polling place, I agree and on that basis alone and no other. The other bases that you allege I do not find to be persuasive, but I do feel that the statute as written is overly broad and that the objectives that it seeks to achieve can just as easily and just as conveniently be achieved without that great an intrusion upon the right of speech and expression. So to that extent, to the extent that the statute prohibits such activities within 600 feet of a polling place I do find it to be unconstitutional. The Motion to Quash will be granted.

[. . .]

No. 93-1062

SUPREME COURT, U.S.
FILED
MAR 14 1994

In The

Supreme Court of the United States

October Term, 1993

RECALL '92, INC., et al.,

Petitioners,

versus

EDWIN W. EDWARDS, Governor of the State of Louisiana, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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CITATIONS OF OPINIONS AND JUDGMENTS BELOW

The opinions and judgments of the United States District Court for the Middle District of Louisiana and the United States Court of Appeals for the Fifth Circuit are contained in Petitioners Appendix to its Petition for a Writ of Certiorari. All references by Respondents in this opposition brief will be to those decisions contained in Petitioner's Appendix.

INTRODUCTION

The State of Louisiana through the named defendants, Edwin W. Edwards, Governor, Richard P. Ieyoub, Attorney General and W. Fox McKeithen, Secretary of State submit this Brief in Opposition to the Petition for Writ of Certiorari in order to point out material misstatements or omissions of fact or law set forth in the petition, in accord with this Court's Rule 15 as well as to present the state's arguments for denying the petition for writ of certiorari. Respondents will address these specific items of perceived misstatement or omission prior to the argument for the State's position for denying the petition.

STATEMENT OF THE CASE

This case involves a First Amendment challenge to Louisiana's electioneering law, LSA-R.S. 18:1462 which prohibits all electioneering activity as well as to prohibit the display of political signs, pictures, advertising and the distribution of campaign cards, or campaign literature of any description whatsoever, with a 600 foot radius of the entrances to polling places on election and absentee voting days in Louisiana.

Relying on the following this Court's decision in *Burson v. Freeman*, ___ U.S. ___, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992), the United States District Court found the challenged statute constitutional as creating a campaign-free zone around polling places and that the statute applied to both issues and parties whether or not they were on the ballot. See Appendix G. The Fifth Circuit Court of

Appeals affirmed that decision, see Appendix B. Petitioners now ask this Court to reverse and declare the statute unconstitutional, alleging two grounds, "(1) whether, consistent with the First Amendment, a state can proscribe non-ballot related political speech in areas outside polling places on election days, and (2) at what measurable distance from the polls does the government's restriction of political speech become an impermissible burden on First Amendment rights. Petition p. 4. It should be noted at the outset that the statute does not bar "political speech" but prohibits the activities set forth in the statute as interpreted by the United States District and Appellate Courts and the Louisiana Supreme Court on certification from the Fifth Circuit, *Schirmer, et al. v. Edwards, et al.*, No. 92-CQ-2829, Appendix E. All of these Courts correctly decided that LSA-R.S. 18:1462 did prohibit the solicitation of signatures in a recall petition and that the statute applied to that activity.

MISSTATEMENTS OR OMISSIONS OF LAW AND FACT

First, the challenged statute is incompletely set out, in the petition, in that sections B through F are omitted, p. 3 Appendix A, these sections were not challenged. Section B, set out below, is however, vital, in that it exempts private property, not used as a polling place, from the prohibition on the placing of political signs and pictures. This important section distinguishes two cases relied on by petitioner in the application:

LSA-R.S. 18:1462

A. Except as otherwise provided by law, it shall be unlawful for any person, between the hours of 6:00 a.m. and 9:00 p.m., to perform or cause to be performed any of the following acts within any polling place being used in an election on election day or within any place wherein absentee voting is being conducted, or within a radius of six hundred feet of the entrance to any polling place being used in an election on election day or any place wherein absentee voting is being conducted:

(1) To solicit in any manner or by any means whatsoever any other person to vote for or against any candidate or proposition being voted on in such election.

(2) To remain within any such polling place or place wherein absentee voting is being conducted or within a radius of six hundred feet of the entrance of any such polling place, except when exercising the right to vote, after having been directed, in writing, by an election commissioner or law enforcement officer to leave the premises or are of a polling place or after having been directed, in writing, by a registrar or deputy registrar to leave the place wherein absentee voting is being conducted.

(3) To hand out, place, or display campaign cards, pictures, or other campaign literature of any kind or description whatsoever.

(4) To place or display political signs, pictures, or other forms of political advertising.

B. The provisions hereof shall not apply to the placing and displaying, either by the owner,

> lessee, or lawful occupant thereof, or with the consent of such owner, lessee or occupant, of political signs or pictures on private property which is not being used as a polling place.

At p. 15 of the petition, it is alleged that there is a conflict between the 5th Circuit's decision in this case and the 11th circuit's decision in *Clean-Up '84 v. Heinrich*, 759 F.2d 1511 (11th Cir. 1985). Initially respondents submit that *Clean-Up '84* was decided seven (7) years prior to the Court's landmark decision in *Burson v. Freeman, supra* (1992) and that *Burson* represents the rule in the United States and that there is therefore no conflict. Furthermore, *Clean-Up* is distinguished by the fact that the prohibition contained in the Florida statute did not exempt private property as does Louisiana's, see Section B above.

Petitioners also cite the post *Burson* case of *Calchera v. Procarione*, 805 F. Supp. 716 (E.D. Wisc. 1993) which found Wisconsin's statute prohibiting campaign speech within 500 feet of the polls unconstitutional. In *Calchera*, the Wisconsin statute did not exempt private property and therefore prohibited the placement of political signs on private property within the 500 foot radius. The Court was uncertain as to the validity of the 500 foot zone, see *Calchera*, p. 719, commenting on *Burson*,

> "This language might suggest that the plurality would have no problem with even a 500 foot boundary as prescribed in Section 12.03(2)."

What the Wisconsin Court had problems with and what was the reason for decision, the State submits, was the private property prohibition, as follows,

> "This is not a case where the legislature is regulating expression in a public forum; section

> 12.03 with its sweeping zone of protection, prohibits individual homeowners from expressing their political views on their own property. p. 720"

The Louisiana statute exempts private property, LSA-R.S. 48:1462 B.

In light of the above there is no conflict in the Circuits and the later District Court case is clearly distinguishable from the petition herein. The state also points out that the companion case relied on by petitioner at p. 12 & 13, *State of Louisiana v. Schirmer,* Appendix H is *not* a final judgment and is presently docketed in the Louisiana Supreme Court as docket No. 93-KA-2631. This is a criminal misdemeanor case and the State is appealing the judgment on the motion to quash the bill of information.

Second. Petitioners in brief, at p. 21 state that Louisiana's restricted zone around polling places dates only from 1960. This is incorrect. A restricted zone or barrier around polling places in Louisiana's statutes dates from 1894. A listing of the acts of the legislature incorporating some barrier is of record in this case and is listed below along with the size of the zone in that act.

(1) Act 181 of 1894, Section 17 created a 15 foot barrier in front of each polling place and a 10 foot barrier to its side.

(2) Act 137 of 1896, Section 41 prohibited any person from obstructing, hindering or delaying any voter on his way to a polling place and provided for a 6 foot barrier.

(3) Act 49 of 1906, Section 37, prohibited any person from buying, selling or offering anything of value to a voter, intimidating,

by threat or promise, any voter for the purpose of influencing his vote. It also provided for at least a six foot barrier.

(4) In 1914, Act 277 increased the barrier from six feet to fifty feet.

(5) Act 97 of 1922 continued the 50 foot guard rail, and prohibited anyone within the barrier, except commissioners, watchers, and voters actually voting. Also provided a penalty for any person who bought any vote or intimidated any voter.

(6) In 1960, Act 40 increased the barrier around the polling place to 600 feet. However, Act 221 of 1960 also increased the barrier to 300 feet and specifically repealed Act 40 of 1960. Act 40 of 1960 was again repealed by Act 32 of 1962.

(7) Act 221 of 1960 enacted LSA-R.S. 18:1534 with a 300 foot barrier. It also provided for candidates to place their campaign cards or sample ballots on a table near the entrance to the polling place, so that a voter could select one if he so desired, "free from the influence, solicitation or suggestion of any kind".

(8) Act 493 of 1972 amended LSA-R.S. 18:1534 to prohibit any person from polling or displaying campaign cards or sample ballots near the entrance to any polling place, thereby repealing the language in Act 221 of 1960.

(9) In 1980, Act 180 increased the barrier around polling places to 600 feet. (repealed LSA-R.S. 18:1534).

Louisiana has a 100 year history of providing some size of restricted zone around the voting area that was found necessary in *Burson*, to secure the state's compelling interest in preventing voter intimidation and election fraud, *Burson* p. 1855.

Third. Petitioners at p. 10, allege that the state did not present concrete evidence for the need of the 600 foot barrier enacted in 1980 by Act 180. This is incorrect. The record is replete with testimony proving the fact that the legislature considered the 300 foot barrier insufficient and raised the barrier to 600 feet for that reason. Representative Charles Lancaster, the author of Act 180 testified that the 300 foot limit "was not effective in having a polling place that was totally free from political influence on election days." (Transcript, Volume 3, p. 145). Representative Joe Accardo, Chairman of the House and Governmental Affairs Committee of the Louisiana House of Representatives, testified that he and that committee supported legislation increasing the distance from 300 feet to 600 feet in LSA-R.S. 18:1462. He stated,

> "I supported the legislation, . . . because in the District I live in, the 300 foot limit was very often not enough distance to keep people who were engaged in political activities from intersecting the voters who were going to the polls. Very often the 300 foot limit was – the parking lots were outside the 300 foot limit. Very often people parked on the street to get to the polling places and there were instances where there was political activity going on by various candidates and their supporters trying to talk to voters as they walked to the polls or try to get to the polls. (Transcript, Volume 3, p. 180).

The record is clear that the Louisiana legislature carefully considered the 300 foot limit and found it to be inadequate, then increased that limit to 600 feet to insure that Louisiana voters would be free of interference, fraud, intimidation and confusion at the polls on election day.

Fourth. Petitioners in brief at p. 18 make the statement that exit polling "is at least as intrusive and disruptive as the activity proposed by petitioner in the instant case which is the solicitation of signatures for a recall petition." Petitioners attempt to rely on exit polling and media interviewing cases, namely, *Daily Herald Company v. Munro,* 838 F.2d 380 (9th Cir. 1988); *NBC v. Cleland,* 697 F.Supp 1204 (N.D. GA. 1988); *CBS Inc. v. Smith,* 681 F.Supp 794 (S.S. Fla. 1988). These cases are not applicable to this question. Exit polling is news gathering activity undertaken after the voter has voted, not political activity, such as an attempt to solicit signatures on a recall petition or an attempt to campaign for a candidate.

The foregoing is submitted in accord with Rule 15. The following is the state's position on why the Judgments of the District Court and Court of Appeal are correct and that the petition for writ of certiorari should be denied.

SUMMARY OF THE ARGUMENT

LSA-R.S. 18:1462 prohibits the political activity listed therein including speech in the form of campaigning within 600 feet of a polling place on election day and during absentee voting. The decisions of the District Court and the Fifth Circuit Court of Appeals upholding

the constitutionality of that statute were mandated by this Supreme Court's recent decision *Burson v. Freeman*, 112 S.Ct. 1846 (1992). It is respondents' position that each state has the right to provide a campaign free zone around its polling places. That each state must rely on its own experience in deciding what size zone it should have. That Louisiana, like Tennessee in *Burson*, has provided such election laws for its citizens for approximately 100 years. That the Louisiana experience as evidenced by its legislative acts indicates that the 600 foot zone is deemed necessary for this purpose. That the statute is narrowly drawn in that it restricts First Amendment rights only while the polls are open on one or two days every years or so and at absentee voting places and that all other places, times and manner of political speech is left open and unrestricted. That this statute is necessary in order to provide Louisiana's citizens free and unencumbered access to the polls so that they may exercise their right to vote freely and without interference, intimidation or confusion.

It is the State's position that it is constitutional for the statute to prohibit non-ballot related activity such as the recall petition herein and without such a prohibition the statute would be virtually unenforceable.

It is further respondents' position that the statute, as found by the District Court, Court of Appeal and Louisiana Supreme Court on certification from the Fifth Circuit, prohibited in section A(3) & (4) the recall petition activity sought to be engaged in by petitioners. There is simply

no necessity to grant the writ to clarify *Burson* for its teachings are clear.

ARGUMENT

The basis of the lower court's decisions upholding the constitutionality of Louisiana's statute is this Court's decision in *Burson* recognizing the state's right to provide a campaign free zone around polling places on election day. The most powerful arguments for not granting the writ and for upholding the statute's constitutionality are contained in Justice Blackmun's decision in *Burson*. In that *Burson* settled the issues raised therein, Petitioner's claim that only two questions remain open for decision in this case. *First*, can Louisiana proscribe political activity, campaigning or politicking not related to items on the election ballot and *second*, is Louisiana's 600 foot campaign-free zone so impermissibly large as to render it unconstitutional.

WHAT SIZE ZONE IS PERMITTED?

Petitioners argue that the real question remaining is, at what measurable distance from the polls does the government's restriction on campaign activity become an impermissible burden on First Amendment rights. The answer to this question is again provided by *Burson* indirectly and is: Whatever distance that is deemed necessary by the State's citizens through their elected representatives in order to insure that the polls will be free from

voter intimidation, interference, election-fraud and confusion, until that zone interferes with First Amendment rights not related to the polling place.

Respondents stress and *Burson* states that the authorized goal of these statutes is to have a campaign free polling place. They are not designed to create difficulties for political activity at the polls, they are designed to eliminate it. Therefore, whatever distance that is necessary in each state's judgment, to accomplish the desired end is appropriate until that distance becomes unreasonable. New Hampshire had ten feet, Louisiana has 600 feet, Kentucky and Wisconsin have 500 feet, thirty-eight states have established campaign-free zones of 250 feet or less, Petition, p.7 None of these states are right or wrong. They simply have different judgments. This Court in *Burson* has upheld Tennessee's 100 foot zone. This question was addressed in *Burson* beginning at 112 S.Ct. 1856 as follows:

> "The real question is how large a restricted zone is permissible or sufficiently tailored. . . .
>
> Furthermore, because a government has such a compelling interest in securing the right to vote freely and effectively, this Court never has held a State "to the burden of demonstrating empirically the objective efforts on political stability that [are] produced" by the voting regulation in question. Citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 107 S.Ct. 533, 537, 93 L.Ed. 2d 499 (1986). . . .

Beginning at p. 1857 *Burson* continued,

> "Thus, requiring proof that a 100-foot boundary is perfectly tailored to deal with voter intimidation and election fraud would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." Id., at 195-196, 107 S.Ct., at 537-38 (emphasis added).

> "We do not think that the minor geographic limitation prescribed by § 2-7-111(b) constitute such a significant impingement. Thus, we simply do not view the question whether the 100-foot boundary line could be somewhat tighter as a question of "constitutional dimension."

Of course, at some distance from the polls, a campaign-free zone would be unconstitutional. *Burson* again addressed this, at p. 1857,

> "At some measurable distance from the polls, of course, governmental regulation of vote solicitation could effectively become an impermissible burden akin to the statute struck down in *Mills v. Alabama, supra.*"

Mills v. Alabama, 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed. 484 (1966) struck down a law that made it a crime for a newspaper editor to publish an editorial election day urging readers to vote in a particular way. Louisiana's 600 foot zone, and the states at 500, 250 or less are not akin to *Mills* which involved no distance but was an outright ban on political speech. Louisiana does not have to draw the perfect distance. The statutory history reflects that in

1980 it considered 300 feet inadequate and amended the statute to increase the zone to 600 feet to accomplish the constitutionally protected purpose. The perfect distance may be 100, 200, 300, 400 or Hawaii's 1000 foot zone, the country's largest. In New Hampshire's judgment, 10 feet is adequate. In the absence of a federal election law on the subject, each state has the right to carve out the campaign free zone that it deems necessary. Louisiana's zone is not impermissibly large. *Burson* answers the questions raised in petitioner's writ application and the petition should be denied.

THE STATE CAN PROHIBIT NON-BALLOT RELATED CAMPAIGN ACTIVITY IN THE CAMPAIGN-FREE ZONE.

The answer to this remaining issue alleged by petitioner is clear to the effect that the statute may ban non-ballot related activity. Any other answer would render the constitutionally authorized zone meaningless for it would allow all other campaign activity or politicking other than ballot related activity. This would open the environs of the polling places to candidates seeking the same *captive audience* that the recall drive sought. Common sense teaches, what better place to find voters than at a polling place. Office seekers facing upcoming elections would descend on polling places to campaign while the voters voted. Some might even campaign for allies on that day's ballot until they were required to leave. Those in favor of a recall would compete for the voters attention with those opposed to the recall creating the kind of political free for all that 100 years of state legislative

history has sought to prevent, for one day (14 hours) and at one place. This would unquestionably increase voter interference, intimidation, election fraud and confusion. All the lower Courts in this case, including the Louisiana Supreme Court concurred that the statute banned the non-ballot related activity engaged in by petitioner. They found that sections (3) and (4) of LSA-R.S. 18:1462 prohibited the recall signs, stands and paraphernalia used by petitioner. These sections are set out below and appear at petitioner's Appendix A.

LSA-R.2. 18:1462

(3) To hand out, place or display campaign cards, pictures, or other campaign literature of any kind or description whatsoever.

(4) To place or display political signs, pictures, or other forms of political advertising.

The Fifth Circuit held that Louisiana's statute banning all political activity described therein was even more defensible than the Tennessee statute upheld in *Burson* and would have answered some of Justice Stevens concerns expressed in his dissent in *Burson*. In any event, it is clear that without the total ban in the campaign-free zone the statute would be potentially useless. The Fifth Circuit in this case, reported at 2 F.3d 117, held correctly at p. 123,

> "Accordingly, we find that a total ban on politicking within the campaign-free zone is not overboard. In fact, the total ban in the present context is the most defensible position. The state has a compelling interest in protecting its voters and the proffered reasons given by the legislature demonstrate a reasonable compromise to

> the problems that necessitated the campaign-free zone in the beginning."

That the states or the federal government have the constitutional power to ban campaign activity or solicitation activity in certain public places is well settled by recent decisions in the following cases. In *U.S. v. Kokinda*, 497 U.S. 720, 111 L. Ed. 571, 110 S.Ct. 3115 (1990) this Court upheld a postal service regulation prohibiting solicitation on postal service premises and the distributing of literature on a sidewalk near a post office entrance. Of particular interest to this case is the *Kokinda* Court's discussion of the nature of solicitation at p. 3123 citing *United States v. Belsky*, 799 F.2d 1485 (11th Cir. 1986),

> " 'Soliciting funds in an inherently more intrusive and complicated activity than is distributing literature.' . . . [it is] more intrusive and intimidating than an encounter with a person giving out information."

In the instant case, petitioners desired to set up recall stands near the polling places to have access both to the captive audience of those desiring to vote and also and even more intrusive, the ability to have those who had voted be able to return to the polls and check their registration signatures while others were attempting to vote. In *Longo v. U.S. Postal Service*, 953 F.2d 790 (2nd Cir. 1992) the Second Circuit held that a postal service regulation prohibiting campaigning for election to public office on postal service property was constitutional. On remand after this Court's *Burson* decision, the *Longo* court changed its rationale but reached the same decision, namely that the postal service could prohibit campaigning on postal service property. This is a year round ban.

The electioneering statute is a one day ban and is as narrowly drawn as is necessary to accomplish the desired end, which is a campaign free polling place.

The Fifth Circuit and the District Court were correct in holding that the statute, in banning the non-ballot related activity the subject of this case, is constitutional.

CONCLUSION

This Court in *Burson v. Freeman, supra,* has answered all of the questions presented in petitioner's writ application. In order to further its constitutionally protected compelling interest in preventing voter intimidation, election fraud, interference and confusion, Louisiana has established, after 100 years of statutory history, a 600 foot campaign-free zone around the polls on election day and absentee voting days. All fifty states have such zones. They are narrowly drawn as to the distance and most importantly *time,* namely one or two days. The statute bans the non-ballot related activity listed therein which included the recall petition, the subject of this case. This is a petition that simply does not need to be granted because this case was in essence, decided by this Honorable Court in 1992 in *Burson v. Freeman.*

A quote from the petition for certiorari best expresses the philosophical differences between petitioner and respondents. It is found at page 18 and cites a phrase from this Court's decision in *City of Houston v. Hill,* 482 U.S. 451, at 452, 107 S.Ct. 2502 (1987) as follows, "a certain-amount of expressive disorder is inevitable in a

free society and must be protected if freedom is to survive." Both this Supreme Court in *Burson* and the legislatures of fifty states have determined that this "expressive disorder" shall not interfere with voting at or near the polling places on election day.

For the above reasons, **Respondents** ask that this Honorable Court deny the petition for Writ of Certiorari in this matter.

Respectfully submitted,

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